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THE SALE OF GOODS IN NEW YORK

A COMMENTARY UPON THE SALES ACT OF 1911
AND RELATED STATUTES

BY

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PREFACE.

THE legislature of 1911 codified the law of the Sale of Goods in New York by the adoption of the Uniform Sales Act, recommended by the Commissioners on Uniform State Laws and now in force in nine states. Numerous and important changes in the law of New York are effected by this statute. A period of several years will doubtless elapse before the act will receive any considerable construction by the courts. During this interim between passage and established construction, it may be useful to practitioners and students to have placed alongside the respective sections of the law, the common law decisions in this state upon the same subject, the statements of the draftsman of the act regarding its intended effect, the experience of the courts outside New York in its interpretation, and explanatory notes. Such is the object of this book.

The text of the book (in heavy face type) consists exclusively of the sections of the Sales Act. Following each section have been placed citations, quotations and notes upon the subject of the section. Section 1 of the Uniform Act has been made section 82 of the New York Personal Property Law, and the other sections of the Uniform Act take corresponding numbers. The title and chapter headings are not part of the statute as enacted by the New York legislature, but have been inserted by the author, and follow largely the outline suggested by the Commissioners on Uniform State Laws.

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It has been the effort of the author to collect under each section the leading cases in this state on the subject there treated, and, where possible, to show the pre-existing rule by a short quotation. If the act has modified the common law, references have frequently been given to decisions of other states adjudicating the rule of the statute.

The extracts from the work upon Sales by the draftsman of the Sales Act, Professor Samuel Williston of the Harvard Law School, are made with his consent, and, in connection with the notes published by the Commissioners on Uniform State Laws, which are also inserted herein, will be useful aids to the understanding of the act.

The English Sale of Goods Act, the model from which the American Sales Act was drafted, has been in force in England since 1894. The statutes are so similar that it is believed that material aid in the construction of the American act may be obtained from the English decisions, and it is for that reason that the English act is printed in the appendix and brief digests given in the body of the book of all pertinent English cases in the higher courts which consider the Sale of Goods Act.

The American Sales Act reached its final form and was recommended to the legislatures for adoption in 1906. In 1907 two states (Connecticut and New Jersey) and one territory (Arizona) accepted the law, and, from time to time thereafter, six other states, including New York, have adopted it. There are thus a small number of decisions by American courts in construction of the Sales Act, and these are collected under the appropriate sections.

The legislature incorporated the Sales Act into the Personal Property Law. It has been thought of use to place in the appendix of this book the full text of the Personal Property Law, with the exception of a few sections having no connection with the subject of Sales. The

Uniform Bills of Lading Act of 1911 is included in the Personal Property Law and is to be found in the appendix.

The author wishes to express his gratitude to Professor Williston for permission granted to make extracts from his valuable book on Sales, and also to acknowledge the faithful and efficient service of Mr. Walter J. Donovan in the collection of cases and clerical work.

GEORGE G. BOGERT.

Ithaca, New York.

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CHAP. 571.

AN ACT to amend the personal property law, in relation to sales of goods.

Became a law June 30, 1911, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article five of chapter forty-five of the laws of nineteen hundred and nine, entitled “An act relating to personal property, constituting chapter forty-one of the consolidated laws,” and sections eighty and eighty-one of such chapter, are hereby respectively renumbered article six and sections one hundred and sixty-five and one hundred and sixty-six; and such chapter is hereby amended by adding thereto a new article five to read as follows:

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THE SALE OF GOODS IN NEW YORK.

PART I.

FORMATION OF THE CONTRACT.

CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

§ 82.* CONTRACTS TO SELL AND SALES. 1.

A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.¹

3. A contract to sell or a sale may be absolute or conditional.²

4. There may be a contract to sell or a sale between one part owner and another.

Effect of Section. This section is obviously definitive and declaratory of the common law.

*The legislature incorporated the Sales Act into the New York Personal Property Law as sections 82 to 158, inclusive.

The following quotation showing the history of the Sales Act appears in the booklet entitled "American Uniform Commercial Acts,"

Bogert's Sales

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English Act. This section corresponds to section 1 of the Sale of Goods Act. The differences are immaterial except (1) that the English act uses the term "contract of sale" to include both contract to sell and sale, whereas the American act has discarded that term, and (2) that the English act requires the price to be a money consideration, whereas the American act classes barter with sale. See post, sec. 90. For the text of the English act see appendix.

¹ **Definitions.** *Sale and Contract to Sell.* The definitions here given are fundamental to an understanding of the act. Sales (often called at common law "sales in praesenti" or "executed sales") and contracts to sell (spoken of also at common law as "executory sales" or "execu-

published by the Commissioners on Uniform State Laws: "The first tentative draft of the Uniform Sale Act was prepared in 1902-3, by Professor Samuel Williston of the Harvard Law School, at the request of the Commissioners of Uniform Laws in National Conference. It was printed in the summer of 1903 and distributed with a request for criticisms. Some were received, and in the light of these a second draft was presented to the Commissioners at their meeting at St. Louis, September 22, 23 and 24, 1904. The draft was then gone over, section by section, by the Commissioners. Doubtful points and changes in wording were discussed and voted upon. The draft was then recommitted to the Committee on Commercial Law, with instructions to embody the changes adopted by the Commissioners and to present a third tentative draft at the meeting of the Commissioners in August, 1905. A third draft was presented, in accordance with these instructions, at the meeting of the Commissioners at Narragansett Pier in August 1905. This draft included for the first time a number of sections on documents of title (Sections 27-40 of the Act as finally adopted). Because of these sections, it was thought best once more to recommit the draft. At the meeting of the Conference in St. Paul in August 1906, the final draft was adopted and recommended to the legislatures of the several states for passage." The Act was adopted in 1907 by Connecticut (Acts of 1907, c. 212), Arizona (Laws of 1907, c. 99), and New Jersey (Laws of 1907, c. 132); in 1908 by Massachusetts (Acts of 1908, c. 237), Rhode Island (Laws of 1908, c. 1548), and Ohio (Laws of 1908, p. 413); in 1910 by Maryland (Laws of 1910, c. 346); and in 1911 by Wisconsin (Laws of 1911, c. 549) and New York (Laws of 1911, c. 571).

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tory contracts of sale") are carefully distinguished throughout. For similar definitions see *Schmerhorn v. Talman*, 14 N. Y. 93, 117; *Madison Avenue Baptist Church v. Oliver St. Baptist Church*, 46 N. Y. 131, 139; *Edwards v. Farmers' F. Ins. Co.* 21 Wend. (N. Y.) 467, 493, 494; *Barber Asphalt Paving Co. v. Standard Asphalt Co.* 39 App. Div. 617, 623, 58 N. Y. S. 405.

"In determining the true character of a contract of sale, as executed or executory, the question must always be, whether the intention was to vest in the purchaser an immediate and absolute title to the thing sold, without reference to the payment of the price, or whether the delivery of the thing, and the payment of the price, were to be simultaneous acts, for in this last case, it is certain that, until delivery, title remains in the seller." *Kelley v. Upton*, 5 Duer (N. Y.) 336, 340.

For cases where the same question was discussed, see *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335.

Similar Transactions Distinguished from Sales. Bailment.

Where a contract is made with a manufacturer to deliver to him raw materials to be returned manufactured, the contract is one of bailment and not of sale. *Foster v. Pettibone*, 7 N. Y. 433. The fundamental distinction between bailment and sale is that in the former the specific thing is to be delivered back, while in the latter money or goods of equal value are to be returned. *Norton v. Woodruff*, 2 N. Y. 153. For cases discussing the question, see *Mallory v. Willis*, 4 N. Y. 76; *Westcott v. Thompson*, 18 N. Y. 363; *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534; *Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667, 46 L.R.A. 679, 73 Am. St. Rep. 686; *Marsh v. Titus*, 3 Hun (N. Y.) 550; *Smith v. Clark*, 21 Wend. (N. Y.) 83, 34 Am. Dec. 213. Parol evidence is admissible to show an apparent bailment to be a sale. *Wadsworth v. Allcott*, 6 N. Y. 64. Concerning the effect of the delivery of grain to a warehouseman and his duties toward it, see Gen. Bus. Law, sec. 109.

Chattel Mortgage and Pledge.

For discussions of transactions claimed to be near the border line between a transfer of goods as security and an absolute transfer, see *Parshall v. Eggert*, 54 N. Y. 18; *Coe v. Cassidy*, 72 N. Y. 133; *Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477; *Brennan v. Crouch*, 125 N. Y. 763, 26 N. E. 620; *Susman v. Whyard*, 149 N. Y. 127, 43 N. E. 413.

Agency to Sell.

See *Elgin First Nat. Bank v. Schween*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; *Gindre v. Kean*, 7 Misc. 582, 28 N. Y. S. 4; *American Seeding Mach. Co. v. Stearns*, 109 App. Div. 192, 95 N. Y. S. 830.

Agency to Buy.

Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; *Keswick v. Rafter*, 35

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App. Div. 508, 54 N. Y. S. 850, affirmed 165 N. Y. 653, 59 N. E. 1124.

Gift.

Noble v. Smith, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399; Van Deusen v. Rowley, 8 N. Y. 358.

Barter.

Apparently under the common law no distinction was made between sales and exchanges. Hudson Iron Co. v. Alger, 54 N. Y. 173. Section 90, post, expressly includes exchanges within the purview of the act.

² **Conditional Sales.** This subdivision obviously states an elementary principle of the law of contract. As to sales in which passing of title is conditioned on payment, see Pers. Prop. Law, sections 62-67 (printed in appendix). These are the transactions commonly referred to as "conditional sales" and are not touched upon directly in the Sales Act. As to "pure" or "suspensory" conditions and the "implied" conditions of the common law, see post, section 92 et seq. ,

CHAPTER II.

CAPACITY OF THE PARTIES.

§ 83. **CAPACITY; LIABILITIES FOR NECESSARIES.** Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.¹ Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.² Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.³

Effect of Section. This section is declaratory of the common law. The Commissioners on Uniform State Laws in their briefly annotated pamphlet entitled "American Uniform Commercial Acts" state regarding this section (page 72): "This section states the prevailing, though not wholly uniform, doctrine of the existing law. Mechem on Sales, § 122 et seq."

English Act. Section 2 of the Sale of Goods Act is practically identical.

¹ **Capacity.** No attempt is here made to deal exhaustively with the subject of the rights and liabilities of persons under disability, since that subject is one in the law of Persons, not Sales. The cases cited below are offered merely as suggestive of the general rules connected with incompetent persons.

Corporate Contracts.

In this connection it may be relevant to call attention to the New

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York doctrine that where a contract with a corporation is executed, the corporation "is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power." *Vought v. Eastern Bldg. Assoc.*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761. On corporate contracts see also *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L.R.A. 708, 19 Am. St. Rep. 482.

Married Women.

On the capacity of married women to bind their husbands by implied agency in the purchase of necessities, see *Wenz v. McCann*, 107 App. Div. 557, 95 N. Y. S. 462; *Schwartz v. Bisland*, 4 Misc. 534, 24 N. Y. S. 700. This implied agency does not extend to the borrowing of money to buy necessities (*Anderson v. Cullen*, 16 Daly (N. Y.) 15, 8 N. Y. S. 643), nor to cases where the husband has furnished the wife with sufficient necessities or with money to buy them (*Oatman v. Watrous*, 120 App. Div. 66, 105 N. Y. S. 174; *Wanamaker v. Weaver*, 176 N. Y. 75, 68 N. E. 135, 65 L.R.A. 529, 98 Am. St. Rep. 621), nor to cases where the wife is living separate from her husband and there is no evidence that he has not furnished her with necessities (*Hass v. Brady*, 49 Misc. 235, 96 N. Y. S. 449).

2 Infants, Lunatics and Drunkards. An infant is liable for necessities furnished him, and no express promise is necessary to enable the seller to recover. *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158. But an infant does not bind himself to pay more than a reasonable value by an agreement to do so. *Baum v. Stone*, 12 N. Y. Wkly. Dig. 353. "An infant who lives with, and is maintained by, her father, cannot bind herself for necessities." *Wailing v. Toll*, 9 Johns. (N. Y.) 141. An infant is liable in tort for fraudulently concealing his age and representing that he is a person fit to be trusted. *Wallace v. Morss*, 5 Hill (N. Y.) 391.

Contracts Voidable.

The contracts of an infant are voidable, not void. They must, if executory, be shown to have been ratified after attainment of majority, in order to be enforceable. If executed, they will be deemed ratified, unless disaffirmed by the infant before he becomes of age, or within a reasonable time thereafter. *Beardsley v. Hotchkiss*, 96 N. Y. 201. The infant's privilege of avoiding his contracts is personal. *Yates v. Lyon*, 61 N. Y. 344. But the heirs at law of an infant may disaffirm his contracts. *O'Rourke v. Hall*, 38 App. Div. 534, 56 N. Y. S. 471.

Duty to Place in Statu Quo.

Where an infant disaffirms a contract, he must restore to the other party what he received thereunder. *Mutual Milk Co. v. Prigge*, 112 App. Div. 652, 98 N. Y. S. 458. And he must account for the value of the deterioration and use of property of which he has had possession. *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L.R.A. 303, 73 Am.

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St. Rep. 703. But if he has wasted the consideration received by him, he may nevertheless disaffirm the contract and recover the property transferred by him, without restoring anything to the other party. *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

Disaffirmance.

The right to disaffirm continues during minority and a reasonable time thereafter. *Chapin v. Shafer*, 49 N. Y. 407. "A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed; there should be a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied." *Goodsell v. Myers*, 3 Wend. (N. Y.) 479, 482; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120.

As to the power of an infant to avoid a sale after the buyer has transferred the property to a *bona fide* purchaser for value, see section 105, post.

Insanity.

"Insane persons require support and their contracts, expressed or implied, for the necessities of life, may be enforced." *Bicknell v. Spear*, 38 Misc. 389, 390, 77 N. Y. S. 920.

A lunatic's estate is liable for necessities furnished to him by a grocer who did not know that a committee had been appointed. *Sharper v. Wing*, 2 Hun (N. Y.) 671. Where the insane person has had the benefit of the agreement and there was no knowledge of the insanity and no unfairness, the contract is valid. *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541. "A lunatic is not absolutely disqualified from making a contract; * * * There is a strong analogy between a lunatic and an infant, in relation to their power to contract; either can oblige himself for necessities, and the law provides for each a formal process by which to avoid their agreements." *Ingraham v. Baldwin*, 9 N. Y. 45, 48.

Judicially Declared Incompetents.

The contracts of a person of unsound mind who has not been judicially declared incompetent are voidable, not void. *Smith v. Ryan*, 191 N. Y. 452, 455, 14 Ann. Cas. 505, 84 N. E. 402, 19 L.R.A. (N.S.) 461, 123 Am. St. Rep. 609. "The law is well settled that a lunatic whose lunacy has been judicially determined and for whom a committee had been appointed, is incapable of entering into any contract, and that any contract which he may assume to make while in that situation is absolutely void." *Carter v. Beckwith*, 128 N. Y. 312, 316, 28 N. E. 582.

As to what is insanity sufficient to affect the validity of a contract, see *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264.

Idiots.

"A serious distinction has always been recognized between lunatics

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and idiots. The one had lucid intervals, the other no power of mind whatever." *Bicknell v. Spear*, 38 Misc. 389, 391, 77 N. Y. S. 920. As to idiots from birth, see *Barnes v. Hathaway*, 66 Barb. (N. Y.) 452.

Drunkards.

"A drunkard is not incompetent like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication." *Van Wyck v. Brasher*, 81 N. Y. 260, 262.

³ **What Are Necessaries?** "The common law defines necessities to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence." *Shelton v. Pendleton*, 18 Conn. 417, 422. Board, lodging, schooling, clothing and physician's services are necessities when they are suitable to the condition of the infant. *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158. The term "necessaries" does not include a house (*Allen v. Lardner*, 78 Hun (N. Y.) 603, 29 N. Y. S. 213), nor a bicycle (*Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L.R.A. 303, 73 Am. St. Rep. 703).

CHAPTER III.

FORMALITIES OF THE CONTRACT.

§ 84. **FORM OF CONTRACT OR SALE.** Subject to the provisions of this article and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Effect of Section. This section is a declaration of an elementary rule of the common law. "A sale by parol, of personal property, is valid, if not within the statute of frauds." *Rochester Bank v. Jones*, 4 N. Y. 497, 503, 55 Am. Dec. 290. "Independently of the statute, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy it, *in præsenti*, for a specified price, would be a sale and transfer of the right to the chattel." *De Fonclear v. Shottenkirk*, 3 Johns. (N. Y.) 170, 174. That the evidence of the contract may be verbal or written or arise from acts is obvious.

English Act. This section is copied very closely from section 3 of the Sale of Goods Act.

§ 85. STATUTE OF FRAUDS. 1. A contract to sell or a sale¹ of any goods or choses in action² of the value of fifty dollars or upwards³ shall not be enforceable by action⁴ unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same,⁵ or give something in earnest to bind the contract, or in part payment,⁶ or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.⁷

2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.⁸

3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.⁹

Effect of Section. The Statute of Frauds relating to sales of personal property in force prior to the adoption of the Sales Act read as follows: "Sec. 31. Agreements required to be in writing. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to

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be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: * * * 6. Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money." (Formerly Pers. Prop. Law, sec. 31; paragraph 6 repealed by Sales Act).

The changes worked by the Statute of Frauds embodied in the Sales Act may be summarized as follows: (1) the memorandum need only be signed, not subscribed; (2) "goods," the subject of contracts within the statute, include "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale" (standing trees and *fructus naturales*); (3) acceptance may be shown by words or conduct, rather than solely by conduct; (4) part payment need no longer be at the time of the contract; (5) a contract to deliver goods to be manufactured or procured is a sale of goods, rather than a contract for work and labor, unless the goods are made upon special order. For elaborations of the significance of these changes and for suggestions as to minor formal changes, see the notes below.

English Act. The Statute of Frauds laid down in Section 4 of the Sale of Goods Act is followed in the American act, except for the addition to the American act of the last clause of subdivision 2 and for the complete alteration of the definition of acceptance in subdivision 3.

The corresponding provisions of the Sale of Goods Act have been several times construed. The clause of the Statute of Frauds relating to contracts not to be performed within one year applies to contracts to sell goods. *Prested Miners Co. v. Gardner*, [1911] 1 K. B. 425.

Even though the contract of sale be unenforceable be-

cause not complying with the statute, the title to the goods passes, if the parties intended it to. "The contract is good. The only effect of the nonfulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer." *Taylor v. Great Eastern R. Co.*, [1901] 1 K. B. 774, 84 L. T. N. S. 770, 773.

There is not sufficient part payment to make the contract enforceable, when the parties merely agree that the seller shall credit the buyer with the amount of a previous overpayment. *Norton v. Davison*, [1899] 1 Q. B. 401, 80 L. T. N. S. 139.

The acceptance and receipt by the seller of bags sent by the buyer as receptacles for potatoes sold, does not constitute part payment or earnest so as to make the contract enforceable under the statute. *Sumner v. Brown*, 25 Times L. Rep. 745.

An oral contract, unenforceable under the statute, is not rendered enforceable against the seller by a document signed by him amounting to a refusal to sign a memorandum submitted by the buyer unless words were introduced into the memorandum showing that the real seller of the goods was a third party. *Re Cox*, 96 L. T. N. S. 719.

A memorandum signed by the buyer in a note book, which does not contain the name of the seller on the sheet where the buyer's name was signed, but which contains the seller's name stamped on the cover, is sufficient to bind the buyer under the statute. *Jones v. Joyner*, 82 L. T. N. S. 768.

Where an oral contract is made for the sale of potatoes and the buyer sends by rail bags for the receipt of the potatoes, the delivery of which bags the seller acknowledges by

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railway delivery note, there is no memorandum of the contract sufficient to make the contract enforceable. *Sumner v. Brown*, 25 Times L. Rep. 745.

Because of the great difference between the American and English theories of acceptance, the following cases on that subject are not deemed deserving of elaboration, but are cited for the sake of completeness: *Abbott v. Wolsey*, [1895] 2 Q. B. 97, 72 L. T. N. S. 581; *Taylor v. Great Eastern R. Co.*, [1901] 1 K. B. 774, 84 L. T. N. S. 770.

¹ What Contracts Are Within Statute. The statute relates only to contracts made on and after September 1, 1911 (post, section 157). For an attempt to make it apply to contracts made previous to the passage of the act, on the theory that it relates solely to the remedy, see a reference to an unnamed and unreported Massachusetts case under the act at page 1042 of *Williston on Sales*. Apparently the New York legislature intended to meet such a contention by the insertion of section 157 into the law, for there is no corresponding section in the uniform act.

Executed and Executory.

The statute applies to executory as well as executed contracts. *Jackson v. Covert*, 5 Wend. (N. Y.) 139; *Sewall v. Fitch*, 8 Cow. (N. Y.) 215,

One Year Clause.

The Sales Act does not affect that provision of the Statute of Frauds requiring a contract not to be performed within one year to be executed with certain formalities. *Brown v. Frederick J. Quinby Co.* 204 Mass. 206, 90 N. E. 586. Under the old statute a contract of sale, if not to be performed within one year, was unenforceable under the one year section of the statute. *Van Woert v. Albany R. Co.* 67 N. Y. 538.

Conflict of Laws.

Where a contract of sale is made between citizens of different states, the question as to what Statute of Frauds applies "must be determined with reference to the facts and circumstances surrounding the parties in each case presented, and the intention of the parties so far as it is disclosed must control." The place where the contract is consummated is not wholly determinative. So where the seller's agent solicited a sale in Maine, the place of the buyer's residence, and a sale was later closed by letters and telegrams, the seller doing business in New York City, the statute of Maine will control. *Wilson v. Lewiston Mill Co.* 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680. For

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other cases on conflict of laws, see *Johnson v. Brooks*, 93 N. Y. 337; *Townsend v. Allen*, 59 Hun (N. Y.) 622, mem., 13 N. Y. S. 73; *Interstate Steamboat Co. v. Syracuse First Nat. Bank*, 87 Mun (N. Y.) 93, 33 N. Y. 966.

Sale and Other Contract.

A contract is within the statute although it includes a promise to do an additional act besides effect the sale, as, for example, to sell and to furnish pasture (*Harman v. Reeve*, 18 C. B. 587, 86 E. C. L. 587, 25 L. J. C. P. 257), or to sell and pay freight (*Irvine v. Stone*, 6 Cush. (Mass.) 508).

Modification of Sale.

An agreement to modify an earlier agreement for the sale of goods is within the Statute of Frauds. *Schultz v. Bradley*, 57 N. Y. 646; *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703.

Contract to Retake Goods.

A contract to take back goods, if part of the original contract, is simply an agreement to rescind and not a separate sale (*Johnston v. Trask*, 116 N. Y. 136, 22 N. E. 377, 5 L.R.A. 630, 15 Am. St. Rep. 394), but if the agreement to resell is made independently of the first bargain it is within the Statute of Frauds as a separate transaction (*Rankins v. Grupe*, 36 Hun (N. Y.) 481; *Blanchard v. Trim*, 38 N. Y. 225).

Partnership Agreements.

Partnership agreements, even though they relate to the sale of goods, are not within the statute. *Stover v. Flack*, 30 N. Y. 64; *Coleman v. Eyre*, 45 N. Y. 38; *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979.

The following agreements have been held not to be sales within the meaning of the statute: a conditional sale (*Alexander v. Kellner*, 131 App. Div. 809, 116 N. Y. S. 98); an agreement to raise a crop of potatoes for another (*Talmadge v. Lane*, 17 Misc. 731, 41 N. Y. S. 413); an agreement to deliver goods in payment of a pre-existing debt (*Woodford v. Patterson*, 32 Barb. (N. Y.) 630); the delivery of personal property on approval (*White v. Knapp*, 47 Barb. (N. Y.) 549).

² "Goods or Choses in Action." *What Are Goods?* The term "goods" includes gold when treated as a commodity (*Peabody v. Speyers*, 56 N. Y. 230); ice, according to the more modern theory (*Higgins v. Kusterer*, 41 Mich. 318, 2 N. W. 13, 32 Am. St. Rep. 160); growing crops (*Sherman v. Willett*, 42 N. Y. 146; *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39); hops (*Webster v. Zielly*, 52 Barb. (N. Y.) 482); and fixtures to be carried away by the buyer (*Durkee v. Powell*, 75 App. Div. 176, 77 N. Y. S. 368; *Lawrence v. Woods*, 4 Bosw. (N. Y.) 354).

Trees and Fructus Naturales.

Formerly trees and fructus naturales were considered interests in real property (*Green v. Armstrong*, 1 Den. (N. Y.) 550), but apparently the definition of "goods" given in section 156 of the Personal

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Property Law alters the law in that respect. The term is there defined as follows:

" 'Goods' include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Tiffany in his work on Sales at page 76 makes the following note concerning this definition: "So far as concerns *fructus naturales*, buildings sold as materials and fixtures, which are agreed to be severed before sale, this declares what has been the general rule. The provision that these things are goods when agreed to be severed "under the contract of sale" seems equivalent, as has been pointed out, to declaring that under a contract of sale they are to be deemed goods, whether the property is to pass before or after severance, and changes the law with regard to buildings sold as materials and *fructus naturales*."

But even at common law, the sale of cord wood to be delivered by the seller is a sale of goods (*Killmore v. Howlett*, 48 N. Y. 569), and the taker of trees under an unenforceable contract is liable to the seller in quasi-contract for their reasonable value (*Wood v. Shultis*, 4 Hun (N. Y.) 309).

Illustrative Cases.

The following articles of property have been held to be realty, rather than goods: manure in heaps and fencing material temporarily detached (*Goodrich v. Jones*, 2 Hill (N. Y.) 142); hop poles (*Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68); brick in the ruins of a building (*Meyers v. Schemp*, 67 Ill. 469); improvements upon land (*Lower v. Winters*, 7 Cow. (N. Y.) 263). But the sale of a house to be removed from its foundations and delivered on rollers is not a sale of realty, but of personalty. *Long v. White*, 42 Ohio St. 59.

Choses in Action.

Under the old statute the following choses in action have been held to be within the scope of the Statute of Frauds: corporate stock (*Tompkins v. Sheehan*, 158 N. Y. 617, 51 N. E. 502); interest in a partnership (*Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415); bonds (*Porter v. Wormser*, 94 N. Y. 431); an unpatented device (*Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279); rights under a contract (*Dns-tan v. McAndrew*, 44 N. Y. 72); a cause of action (*Greenberg v. Davidson*, 39 Misc. 796, 81 N. Y. S. 345).

3 "Value of Fifty Dollars." The uniform act places this amount at \$500, but the New York legislature retained the old standard. In Ohio the amount is \$2,500, in Connecticut \$100 and in Arizona, Maryland, Massachusetts, New Jersey, Rhode Island, and Wisconsin \$500, these being the states which have at present adopted the Sales Act.

Price or Value.

The new statute has changed the word "price" to "value." The

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value of the goods may be unknown at the time of the making of the contract, as where a contract is made to sell the yield of a certain field (*Watts v. Friend*, 10 B. & C. 446, 21 E. C. L. 109; *Bowman v. Conn*, 8 Ind. 58; *Brown v. Sanborn*, 21 Minn. 402), or the young of certain animals produced during a specified period (*Carpenter v. Galloway*, 73 Ind. 418). In such cases the courts do not apply the same rule to the question of value as to the one year clause in the Statute of Frauds, namely, that if the value *may* not be as much as \$50 the contract will not be within the statute. On the other hand, they hold that if the goods actually prove to be of the value of \$50 or more the contract is within the statute.

Exchanges.

Contracts to exchange goods of the value of \$50 or more are within the statute. See post, sec. 90. And the situation was the same under the old statute. *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Chapin v. Potter*, 1 Hilt. (N. Y.) 366.

Several Articles.

A parol contract, made at one interview, for the sale of various kinds of goods, the purchase price of each being less than \$50 but the aggregate price exceeding that sum, was an entire contract within the meaning of the old statute. *Allard v. Greasert*, 61 N. Y. 1; *Brown v. Hall*, 5 Lans. (N. Y.) 177; *Baldey v. Parker*, 2 B. & C. 37, 9 E. C. L. 16. But, where several articles are purchased, the circumstances may show an intent to make separate contracts. *Aldrich v. Pyatt*, 64 Barb. (N. Y.) 391; *Seymour v. Davis*, 2 Sandf. (N. Y.) 239. The Sales Act has no effect on this question.

Auction Sales.

The common law rule regarding auction sales was that, where several articles were struck off separately at an auction, there was but one contract, which was rendered enforceable under the statute by acceptance and receipt of any parcel. *Mills v. Hunt*, 17 Wend. (N. Y.) 333, 20 Wend. (N. Y.) 431. This rule has been changed by section 102 of the Personal Property Law, which makes each article the subject of a separate sale.

4 "Shall Not Be Enforceable by Action." The old statute pronounced a contract not complying with its formalities "void." It is believed that the use of the words "shall not be enforceable by action" in the new statute in place of "is void" have not had any practical effect, since the courts uniformly construed the word "void" in the old statute to mean unenforceable. *Porter v. Wormiser*, 94 N. Y. 431; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Daniels v. Rogers*, 108 App. Div. 338, 96 N. Y. S. 642.

Effect of Statute.

"The Statute of Frauds does not prohibit the making of any agreement in any way that *Digitized by Microsoft®* or render them illegal

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or immoral if not made in some particular way. It simply requires that certain agreements must be proved by a writing. It introduced a new rule of evidence in certain cases without condemning as illegal any contract that was legal before." *Crane v. Powell*, 139 N. Y. 379, 384, 34 N. E. 911.

Pleading.

The statute must be pleaded by demurrer or answer. *Crane v. Powell*, supra. If the complaint alleges a written contract, a denial of its making will allow the defendant to rely on the statute. *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339, 70 N. E. 863. If, on the trial, the plaintiff litigates the question whether the contract was within the statute, it is immaterial that the defendant did not plead it. *Shrimp-ton v. Dworsky*, 2 Misc. 123, 21 N. Y. S. 461.

A buyer who depends on a contract void under the Statute of Frauds cannot recover from a carrier for goods lost while in the carrier's possession, even though, irrespective of the statute, the title had passed to the buyer. The carrier seems to be allowed to take advantage of the statute indirectly. *O'Neill v. New York Cent. R. Co.*, 60 N. Y. 138.

5 Acceptance and Receipt. For definitions of the acceptance and receipt sufficient under the old statute, see note 9 below. This note is concerned only with the capacity to accept and receive and the subject matter of such acceptance and receipt.

Agency.

Acceptance may be by an agent of the buyer. *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17. But the authority of the agent must be proved by evidence outside the verbal agreement for the sale. *Hawley v. Keeler*, 53 N. Y. 114. A carrier has no implied authority to accept the goods for the buyer. *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Allard v. Greasert*, 61 N. Y. 1. And this is true even though the carrier be designated by the buyer as the means of transportation. *Rodgers v. Phillips*, 40 N. Y. 519. But a carrier has implied authority to receive for the buyer. *Allard v. Greasert*, 61 N. Y. 1; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17. Acceptance by one joint buyer not a partner nor expressly or impliedly authorized to accept is sufficient to bind the other joint buyer. *Smith v. Milliken*, 7 Lans. (N. Y.) 336.

Part of Goods.

Acceptance and receipt of part of the goods is sufficient. *Van Woert v. Albany R. Co.*, 67 N. Y. 538; *Baumann v. Moseley*, 73 Hun (N. Y.) 40, 25 N. Y. S. 882; affirmed with no opinion, 145 N. Y. 620, 40 N. E. 163; *MacEvoy v. Aronson*, 46 Misc. 622, 92 N. Y. S. 724. Acceptance and receipt of a sample is sufficient to make the contract enforceable, if the sample be considered a part of the bulk sold. *Brock*

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v. Knower, 37 Hun (N. Y.) 609. But not unless it be so considered. Carver v. Lane, 4 E. D. Smith (N. Y.) 168. Acceptance and receipt of other stock owned separately does not make a contract to sell the plaintiff's stock enforceable under the statute, although the agreement for the purchase of all the stock was made at the same time and through the same agent. Tompkins v. Sheehan, 158 N. Y. 617, 53 N. E. 502.

Symbolical Acceptance.

There may be acceptance and receipt sufficient to make the contract binding through the acceptance and receipt of a symbol of the property sold, such as a bill of lading (Rodgers v. Phillips, 40 N. Y. 519), or a warehouse receipt (Whitlock v. Hay, 58 N. Y. 484).

Choses in Action.

On the sale of an unpatented device, acceptance and receipt of a model of the device is sufficient to make the contract binding. Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279. Acceptance and receipt of a promissory note given for part of an account for goods sold and delivered is sufficient to take the sale of the whole account out of the statute. Armstrong v. Cushney, 43 Barb. (N. Y.) 340.

6 Part Payment. *Time of Making.* The old statute required part payment to be made "at the time" of the making of the contract of sale. Hawley v. Keeler, 53 N. Y. 114; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65. The new statute changes the law by omitting the words "at the time." Under the former statute, however, the part payment was sufficient, although not made at the time of the bargain, if there was a restatement and recognition of the essential terms of the contract at the time of the payment. Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Webster v. Zielly, 52 Barb. (N. Y.) 482. But a mere reference to the subject-matter of the contract was insufficient. Hallenbeck v. Cochran, 20 Hun (N. Y.) 416.

Payment by Credit.

Where goods are sold, the purchase price to be credited on an antecedent indebtedness, a mere oral statement by the buyer that he will credit the amount on the debt, coupled with a secret entry on a blank page of a book, not connected with the account of the seller, is insufficient to show part payment. It is necessary that "the creditor and purchaser should part with some written evidence of such application, which shall bind him, and put it into the power of his debtor and vendor to enforce the contract." Brabin v. Hyde, 32 N. Y. 519, 523. See also, Walrath v. Richie, 5 Lans. (N. Y.) 362; Artcher v. Zeh, 5 Hill (N. Y.) 200.

Note.

Taking the note of the buyer for the price is not payment, though acceptance of the note of a third person will be so considered if it be

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taken absolutely. *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Ireland v. Johnson*, 18 Abb. Pr. (N. Y.) 392; *Artcher v. Zeh*, 5 Hill (N. Y.) 200.

Need Not Be in Money.

Part payment may be in property other than money (post, sec. 90), or in the use of property (*Weir v. Hudnut*, 115 Ind. 525, 18 N. E. 24).

Payment to an Agent.

Part payment may be made to an agent, but his authority must be derived from a source other than the oral contract sought to be removed from the statute. *Hawley v. Keeler*, 53 N. Y. 114.

Effect of Tender.

The assent of both parties is necessary to give part payment a binding effect. Mere tender is not enough. *Hershey Lumber Co. v. St. Paul Sash Co.*, 66 Minn. 449, 69 N. W. 215; *Hawley v. Keeler*, 53 N. Y. 114; *Edgerton v. Hodge*, 41 Vt. 676.

Earnest.

The giving of "something in earnest to bind the contract" is of no practical importance in this state. It is not distinguished from part payment. See *Williston on Sales*, pages 105-106.

⁷ **Memorandum.** *Cases Involving Contracts Other than Sales.* It should be noted that, while the requirements of the new statute have affected the memorandum necessary in the case of a contract for sale or sale of goods, the old statute (sec. 31, P. P. L.) governs the memoranda necessary in connection with several other agreements within the Statute of Frauds. Such memoranda must still be subscribed. Because of the fact that the provisions of section 31 of the Personal Property Law formerly governed these other agreements aside from sales of personal property, a number of cases bearing upon the sufficiency of memoranda are cited below which do not involve sales of goods. They are deemed pertinent here because the requirements concerning the memorandum were formerly the same.

Sufficiency of Memoranda. Illustrative Cases.

The following cases illustrate the views of the New York courts concerning the sufficiency of memoranda under the old statute; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576 (written offer signed by party to be charged and later accepted by parol is sufficient); *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190 (written offer accepted by parol sufficient); *Argus Co. v. Albany*, 55 N. Y. 495, 14 Am. Rep. 296 (resolution of common council subscribed by clerk sufficient); *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511 (telegram sufficient); *Waxelbaum v. Schloss*, 131 App. Div. 826, 116 N. Y. S. 42 (written request to call "in reference to the goods you selected" insufficient as not showing a confirmation of the sale); *Myers v. Harris*, 104 N. Y. S. 514 (letter confirming order as to part and cancelling as to remainder suf-

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ficient); *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509 (buyer not bound by entry made by seller and read to buyer's agent and assented to by him); *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286 (pencil memorandum sufficient).

Purpose of Memorandum.

The purpose for which the memorandum was made is immaterial. *Peabody v. Speyers*, 56 N. Y. 230; *J. Spencer Turner Co. v. Robinson*, 55 Misc. 280, 105 N. Y. S. 98. But see *Montauk Assoc. v. Daly*, 62 App. Div. 101, 70 N. Y. S. 861, affirmed 171 N. Y. 659, 63 N. E. 1119.

Incorporation by Reference.

A memorandum "may be made certain and definite, and thus valid, under the statute, by reference to another writing, as well as by incorporating the entire contract in one paper. But the reference must be to another paper, and so distinct as to make that paper a part of the contract itself (*Kenworthy v. Schofield*, 2 B. & C. 945, 9 E. C. L. 286). The parties cannot unite two papers, so as to make them unitedly constitute a valid contract, unless they are physically joined, or the intention to unite them appears on the face of the papers. If the connection between two papers depend upon verbal testimony, or if the reference in the written memorandum is to something verbal, the whole evil intended to be remedied by statute will be experienced. The writing being only one link in the chain of evidence to establish the contract, the contract is not in writing, and the case is not taken out of the statute." *Wright v. Weeks*, 25 N. Y. 153, 160, 161.

Two or More Writings. Illustrative Cases.

- A memorandum may be made up of several documents. The following cases have considered the sufficiency of connection between two or more documents relied on to constitute a memorandum: *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680 (letter referring to preceding letter containing the terms of the contract is not sufficient memorandum when second letter does not admit the making of the contract alluded to); *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550 (sufficient when document subscribed refers to the unsubscribed); *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644, 4 N. E. 747 (contents connecting several letters); *Peabody v. Speyers*, 56 N. Y. 230 (separate papers referring to same subject-matter treated as one memorandum); *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511 (telegram and letter read together); *Tallman v. Franklin*, 14 N. Y. 584 (letter pinned to page of book may be considered with written matter on page and as over signature on page); *J. Spencer Turner Co. v. Robinson*, 55 Misc. 280, 105 N. Y. S. 98 (several papers read together; all signed by party to be charged); *Levin v. Dietz*, 48 Misc. 593, 96 N. Y. S. 468 (memoranda all subscribed by party to be charged sufficient); *Roaring Spring Blank Book Co. v. Lesser*, 75 Misc. 617.

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Time of Making.

The memorandum may be made before the contract is consummated (*Hagedorn v. Lang*, 34 App. Div. 117, 55 N. Y. S. 602), or after the sale (*J. Spencer Turner Co. v. Robinson*, 55 Misc. 280, 105 N. Y. S. 98). See also *Webster v. Zielly*, 52 Barb. (N. Y.) 482, 485, 486 [questioned in *Hunter v. Wetsell*, 57 N. Y. 380, 15 Am. Rep. 508].

Contents of Memorandum. Illustrative Cases.

The memorandum must contain all the essential terms of the contract. The following are cases determining the sufficiency or insufficiency of the contents of memoranda: *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339, 345, 70 N. E. 863 (telegram insufficient because important details omitted); *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434 (parol evidence necessary to show for whose benefit promise of guaranty was made; memorandum insufficient); *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 11 L.R.A. 97, 19 Am. St. Rep. 514 (memorandum must contain subject-matter of sale, terms, and names or a description of parties; here memorandum insufficient because name of seller omitted); *Drake v. Seaman*, 97 N. Y. 230 (memorandum insufficient because services to be rendered by salesman under contract not to be performed within a year not mentioned); *Raubitschek v. Blank*, 80 N. Y. 478 (receipt containing all terms of contract except term of credit is, taken in connection with a check given as part payment, a sufficient memorandum); *Stone v. Browning*, 68 N. Y. 598 (memorandum omitting price and terms of contract is insufficient); *Newbery v. Wall*, 65 N. Y. 484 (consideration and terms of purchase omitted; memorandum insufficient); *Wright v. Weeks*, 25 N. Y. 153 (memorandum stating price but referring to "terms as specified," meaning thereby as specified by oral agreement, is insufficient); *Juilliard v. Trokie*, 139 App. Div. 530, 124 N. Y. S. 121 (letter asking for correction of statement of terms in another memorandum insufficient); *Davis v. Shields*, 26 Wend. (N. Y.) 341 (memorandum omitting an agreement for six months credit is insufficient).

Consideration.

Prior to the Revised Statutes of 1830 the consideration was not required to be *expressly* stated in the memorandum. It was sufficient if it could be inferred. *Rogers v. Kneeland*, 10 Wend. (N. Y.) 218. The Revised Statutes of 1830 amended the statute by requiring the consideration to be expressed; but it was soon held that the words "for value received" were sufficient expression of the consideration. *Miller v. Cook*, 23 N. Y. 495. In 1863 the legislature, by chapter 464 of the laws of that year, struck out the clause requiring the consideration to be expressed. The effect of this amendment was to leave the law as it was prior to 1830 and to allow the consideration to be inferred or argued out, but it did not make wholly unnecessary the statement of the consideration. *Drake v. Seaman*, 97 N. Y. 230.

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Parol Evidence. Illustrative Cases.

While it is true that the written memorandum must contain all the terms of the contract, still parol evidence is admissible to explain technical terms used in the memorandum and to show the surrounding circumstances. The following cases discuss the question: *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844 (marks and characters of a technical nature may be explained by parol); *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111 (parol evidence in aid of memorandum when contract partly performed); *Peabody v. Speyers*, 56 N. Y. 230 (meaning of technical terms, phrases and abbreviations may be shown by parol); *Wright v. Weeks*, 25 N. Y. 153 (trade terms may be shown by parol to have acquired a meaning by usage); *Tallman v. Franklin*, 14 N. Y. 584 (parol evidence admissible to identify the subject-matter mentioned in the memorandum); *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130 ("best . . madder 12 $\frac{1}{4}$ " may be shown by parol to refer to the price per pound); *Flash v. Rossiter*, 116 App. Div. 880, 102 N. Y. S. 449 (memorandum showed sale "at present prices"; parol evidence admissible to show standard price lists at that time); *Bowers v. Ocean Acc. Corp.*, 110 App. Div. 691, 97 N. Y. S. 485, affirmed 187 N. Y. 561, 80 N. E. 1105 (parol evidence admissible to ascertain and locate property referred to in memorandum); *Hagan v. Domestic Sewing Mach. Co.*, 9 Hun (N. Y.) 73 (parol evidence admissible to show circumstances surrounding contract for services, for purposes of making clear what services the employee was to render).

Signing or Subscribing.

Under the old statute actual *subscription* by the party to be charged or his agent was necessary. *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644, 6 N. E. 747; *Coe v. Tough*, 116 N. Y. 277, 22 N. E. 550; *Davis v. Shields*, 26 Wend. (N. Y.) 341. The word "subscribed" has been changed to "signed" by the new statute. This makes possible a signature at any place in the memorandum and not necessarily at the physical end thereof.

Who Must Sign?

The memorandum need be signed only by the party to be charged, the defendant. *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103.

Agency in Signing.

The signature of the party to be charged may be made by an agent. *Dykens v. Townsend*, 24 N. Y. 57. But one party to the contract cannot be the agent of the other for the purpose of signing the memorandum. *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680. The authority of the agent to sign the memorandum need not be proved by evidence outside the oral evidence of the

contract of sale. *Hawley v. Keeler*, 53 N. Y. 114. A telegraph company's employee (*Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511), and a broker (*Sale v. Darragh*, 2 Hilt. (N. Y.) 184) have implied authority to sign the name of their principals to memoranda.

Signature by Auctioneer.

Section 31 of the Personal Property Law gives an auctioneer authority to make a memorandum for both buyer and seller. Probably such authority would be implied, in the absence of the statute. *Tallman v. Franklin*, 14 N. Y. 584; *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 11 L.R.A. 97, 19 Am. St. Rep. 514. The auctioneer's implied authority extends to inserting the terms of sale after the principal has himself signed the memorandum. *Hagedorn v. Lang*, 34 App. Div. 117, 54 N. Y. S. 602. But the authority of the auctioneer may be revoked at any time prior to the making of the memorandum, even after the property has been "knocked down" to the bidder. *Byrne v. Fremont Realty Co.*, 120 App. Div. 692, 105 N. Y. S. 838.

⁸ **Contract of Sale or Work and Labor.** *Note of Draftsman.* The draftsman of the act, Professor Williston, in connection with a draft reported to the American Bar Association and printed in the reports of that body for 1906, vol. 30, part 2, at page 343 et seq., adds at page 346 the following note regarding the effect of the Sales Act upon the law on this subject: "The first half of subsection (2) is taken from the English Act which has enacted the rule laid down by *Lee vs. Griffin*, 1 B. & S. 272. Though this rule is the most scientifically exact, and has been so recognized by writers (e. g., *Benjamin on Sales*, § 103), it has found little support in this country, even in cases decided since *Lee v. Griffin*. The qualification here added to the English subsection is intended to reproduce the rule laid down by *Shaw, C. J.*, in *Mixer vs. Howarth*, 21 Pick. (Mass.) 205, and by *Ames, J.*, in *Goddard v. Binney*, 115 Mass. 450. The New York rule is still different, and in other states the line may not always be drawn at exactly the same point. The authorities are collected in *Mechem*, §§ 304-326, and the conclusion drawn in § 326 seems justified by the cases and justifies the form of this proposed draft: 'The Massachusetts rule seems likely to be received with favor wherever the courts are not debarred by earlier decisions from adopting it.'"

Construction of Old Statute. Illustrative Cases.

The old New York rule was that if the goods were not substantially in existence at the time of the making of the contract of sale, an agreement to deliver them later was an agreement for work and labor, and not for the sale of goods. "The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. * * * The statute alludes to a sale of goods, assuming that the articles are already in existence." *Parsons v. Loucks*, 48 N. Y. 17, 19, 8 Am. Rep. 517. The following cases il-

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illustrate the operation of the old rule: *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187 (agreement to manufacture wood-work of a wagon is contract for work and labor); *Warren Chemical Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908 (agreement to deliver patent roofing material to be manufactured by seller one for work and labor); *Higgins v. Murray*, 73 N. Y. 252 (agreement to make tent one for work and labor and not within statute); *Deal v. Maxwell*, 51 N. Y. 652 (agreement to procure materials, manufacture therefrom and deliver stocking shoddy is a contract for work and labor); *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517 (contract to manufacture and deliver paper not within statute); *Garvin Mach. Co. v. Hutchinson*, 1 App. Div. 380, 37 N. Y. S. 394 (contract to make and deliver foot presses not within statute); *Sewall v. Fitch*, 8 Cow. (N. Y.) 215 (agreement to manufacture nails not a sale). These cases are rendered obsolete by the present statute. But a contract by an artisan to bestow his labor on materials to be furnished by him and thus to produce fixtures to be attached to the real estate of his employer is not one for the sale of goods. *Courtright v. Stewart*, 19 Barb. (N. Y.) 455.

But under the old rule a contract to deliver an article substantially in existence, though work was to be done upon it, was a contract of sale. *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619 (lumber to be cut and dressed); *Downs v. Ross*, 23 Wend. (N. Y.) 270 (wheat to be threshed and cleaned); *Smith v. New York Cent. R. Co.*, 4 Keyes (N. Y.) 180 (wood to be cut); *Bates v. Coster*, 1 Hun (N. Y.) 400 (stallion to be altered); *Kellogg v. Witherhead*, 4 Hun (N. Y.) 273 (hams to be treated); *Flint v. Corbitt*, 6 Daly (N. Y.) 429 (furniture to be covered). These cases are, of course, unaffected by the present statute.

And where goods were to be procured substantially in their ultimate form from another by the seller, the contract was, under the old statute, a sale. *Millar v. Fitzgibbons*, 9 Daly (N. Y.) 505; *Seymour v. Davis*, 2 Sandf. (N. Y.) 239. See also *Smalley v. Hamblin*, 170 Mass. 380, 49 N. E. 626, to the same effect.

English Rule Basis of Sales Act Rule.

The English rule which is the basis of the first half of subdivision 2 of this section is best illustrated by the case of *Lee v. Griffin*, 1 B. & S. 272, 101 E. C. L. 272, 30 L. J. Q. B. 252. This was an action to recover the contract price of two sets of artificial teeth and the contract was held to be one of sale and within the statute, the court laying down the rule in the following words: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." Digitized by Microsoft®

Regarding this rule, the court in *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619, at page 360, said: "Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee v. Griffin*. * * * It is too late to adopt it in full in this state." The Canadian cases have followed *Lee v. Griffin* and may now be considered as applicable in giving construction to the first half of subsection 2 above. *Canada Bank Note Engraving Co. v. Toronto R. Co.*, 22 Ont. App. 462; *Wolfenden v. Wilson*, 33 U. C. Q. B. 442.

Massachusetts Rule Followed Also.

The Massachusetts rule, prior to the adoption of the Sales Act in that state, was that a contract to manufacture goods in the ordinary course of business was one for the sale of goods. This rule has been continued in the Sales Act also, so that the following Massachusetts cases adjudicating the rule of that state would seem to be useful in giving construction to the Sales Act in New York: *May v. Ward*, 134 Mass. 127 (agreement to manufacture sheet iron a contract of sale); *Waterman v. Meigs*, 4 Cush. 497 (agreement to furnish planks for ship-building contract of sale); *Clark v. Nichols*, 107 Mass. 547 (contract to furnish planks); *Gardner v. Joy*, 9 Met. 177 (contract to make candles); *Lamb v. Crafts*, 12 Met. 353 (agreement to furnish tallow). This portion of the Massachusetts rule is thus stated in *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112, "a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies."

Special Order Rule.

The so-called "special order" test is laid down in the last clause of subdivision 2. This rule has been promulgated by the Massachusetts courts, and in *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112, it is said to mean that "if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." In the last mentioned case the contract was to furnish a buggy of special style and finish and the contract was held to be one for work and labor. For other cases illustrating this doctrine see *Spencer v. Cone*, 1 Met. 283 (agreement to furnish stave machines), and *Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256 (contract to finish partly completed carriage and to insert special lining).

This rule was not in force in New York prior to the adoption of the Sales Act, although a tendency to favor it is to be noted in a few cases. *Passaic Mfg. Co. v. Hoffman*, 3 Daly (N. Y.) 495; *Donnell v. Hearn*, 12 Daly (N. Y.) 230; *Hinds v. Kellogg*, 13 N. Y. S. 922,

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affirmed 133 N. Y. 536, 30 N. E. 1148. In its application it would seem that the Massachusetts cases above referred to would be germane.

9 Definition of Acceptance and Receipt. *Acceptance and Receipt Separate.* "A purchaser may accept without receiving, and he may receive without accepting; and, in order to comply with the statute of frauds, he must both accept and receive. * * * There is nothing in the statute which requires that the accepting and receiving shall be at the same time." *Cross v. O'Donnell*, 44 N. Y. 661, 664, 4 Am. Rep. 721. Upon the distinctness of the two acts, see also *Cooke v. Millard*, 65 N. Y. 352, 367, 368, 22 Am. Rep. 619. Acceptance and receipt are, however, usually considered and defined together, hence the combination of the two subjects in this note.

Under Construction of Old Statute an "Act" Necessary.

Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, is the leading case. The following is an extract from the opinion (page 268); "The uniform doctrine of the cases, however, has been, that in order to satisfy the statute there must be something more than mere words—that the act of accepting and receiving required to dispense with a note in writing, implies more than a simple act of the mind." And later in the same opinion the statement is made (page 273) that "delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract." This doctrine has been criticised in *Browne on the Statute of Frauds*, at pages 430, 432-433, *Williston on Sales*, at page 96 and *Tiffany on Sales* at pages 88-89, but has been generally adhered to in this state. In *re Hoover*, 33 Hun (N. Y.) 553; *Drake Hardware Co. v. Dewitt*, 142 App. Div. 189, 126 N. Y. S. 868. As was said in *Dedrich v. Leonard*, 3 N. Y. St. Rep. 780, the New York view has been that "acceptance and receipt under the statute of frauds are acts." The new statute allows acceptance "by words or conduct." This would seem to do away with the requirement of an "act" so far as acceptance is concerned, but to leave the situation the same in respect to receipt.

Assent to Ownership.

The new statute makes it an element of acceptance that the buyer "assent to becoming the owner of those specific goods." This is believed to coincide with the construction given to the old statute. Thus in *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461, the following rule is laid down: "Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract." And in *Rodgers v. Phillips*, 40 N. Y. 519, 524, it is said that there must be an intention "to assume the title." See also *Heermance v. Taylor*, 14 Hun (N. Y.)

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149; *Dorsey v. Pike*, 50 Hun (N. Y.) 534, 3 N. Y. S. 730; *Drake Hardware Co. v. Dewitt*, 142 App. Div. 189, 126 N. Y. S. 868.

Receipt Defined.

"The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not." *Cooke v. Millard*, 65 N. Y. 352, 368, 22 Am. Rep. 619.

Virtual Delivery.

"It is not indispensable, however, that there should, in all cases, be an actual manual delivery and acceptance. A virtual delivery and acceptance may, in some instances, be equally effectual. * * * Thus, if the articles are ponderous, and not easily susceptible of actual delivery, and the vendee proceeds to exercise a right of ownership over them, by disposing of them, or giving orders and directions respecting them, this will justify a jury in finding a delivery and acceptance." *Outwater v. Dodge*, 6 Wend. (N. Y.) 397. See also *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509.

Mutual Assent Necessary.

Acceptance and receipt by the buyer must be with the consent of the seller. The acts removing the contract from the effect of the statute must show mutual intent. *Follett Wool Co. v. Utica Trust Co.*, 84 App. Div. 151, 82 N. Y. S. 597; *Hawley v. Keeler*, 53 N. Y. 114; *Brand v. Focht*, 1 Abb. App. Dec. (N. Y.) 185; *Dyer v. Forest*, 2 Abb. Pr. (N. Y.) 282.

Ordinarily the question of acceptance and receipt is one of fact, but it may be decided by the court when the uncontroverted facts leave no doubt. *Stone v. Browning*, 68 N. Y. 598.

Acceptance and Receipt. Illustrative Cases.

The following cases indicate the meaning given to the terms "acceptance and receipt" in the construction of the old statute: *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707 (detention for an unreasonable length of time shows acceptance); *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619 (no receipt; lumber placed on seller's dock with notice of such deposit); *Marsh v. Rouse*, 44 N. Y. 643 (no acceptance and receipt when goods in possession of third person and buyer did nothing but give directions regarding shipment); *Gray v. Davis*, 10 N. Y. 285 (making inventory and directing use of keys sufficient evidence of acceptance and receipt to go to jury); *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316 (no acceptance and receipt shown by mere conversation at time of sale); *Scully v. Smith*, 110 App. Div. 88, 96 N. Y. S. 998 (no receipt by delivery in cars over which seller re-

tains control); *Bristol v. Mente*, 79 App. Div. 67, 80 N. Y. S. 52, affirmed with no opinion, 178 N. Y. 599, 70 N. E. 1096 (portion of goods in hands of buyer for examination; later agreement to buy rendered enforceable by this possession); *Durkee v. Powell*, 75 App. Div. 176, 77 N. Y. S. 368 (taking possession of house sufficient acceptance and receipt of screens stored therein); *Hallenbeck v. Cochran*, 20 Hun (N. Y.) 416 (statement that "the hay is yours" assented to by buyer not sufficient acceptance and receipt); *Linde v. Huntington*, 37 Misc. 212, 75 N. Y. S. 161 (sale of picture in possession of buyer; no acts to show acceptance); *Grey v. Cary*, 9 Daly (N. Y.) 363 (no receipt of goods injured while being driven into buyer's yard at direction of buyer); *Timoney v. Hoppock*, 13 Civ. Pro. 361, 13 N. Y. St. Rep. 568 (sale of elevator by tenant to landlord; acceptance and receipt by leaving in building with consent of landlord). A resale by the seller or an action for damages for non-acceptance is inconsistent with acceptance of the goods by the buyer so as to make the contract enforceable under the statute. *Brackett Co. v. Kornblum*, 71 Misc. 123, 127 N. Y. S. 1078.

Must Be Unconditional.

The acceptance of the goods by the buyer must be unconditional. The retention of the right to reject is inconsistent with acceptance sufficient to make the contract enforceable. *Shindler v. Houston*, 1 N. Y. 261, 273, 49 Am. Dec. 316; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Stone v. Browning*, 68 N. Y. 598; *U. S. Reflector Co. v. Rushton*, 7 Daly (N. Y.) 411, 415. But see *Doyle v. Beaupre*, 63 Hun (N. Y.) 624, mem., 43 N. Y. St. Rep. 741; affirmed 137 N. Y. 558, 33 N. E. 337. That the refusal to accept is unreasonable is immaterial. *Stone v. Browning*, 68 N. Y. 598; *Hatch v. Gluck*, 47 Misc. 122, 93 N. Y. S. 508.

Apparently acceptance of the goods under mistake would not take the contract out of the statute. *Rodgers v. Phillips*, 40 N. Y. 519. The retention of the seller's lien is inconsistent with proper acceptance and receipt. *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316. The return of the goods after a proper acceptance and receipt is immaterial. *Koster v. Koedding*, 34 Misc. 765, 68 N. Y. S. 794. When one party has bought cotton and a second agrees to take a share in it, acceptance and receipt by the first party does not make his contract with the second party enforceable under the statute. *Lewin v. Stewart*, 17 How. Pr. (N. Y.) 5.

Time of Acceptance and Receipt.

Acceptance and receipt under the old statute, as under the new, did not need to be at the time of the making of the contract. *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370. It might precede (*Stockton v. Rogers*, 17 Misc. 138, 39 N. Y. S. 400; *U. S. Reflector Co. v. Rushton*, 7 Daly (N. Y.) 411) or follow (*Thedford v. Herbert*,

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195 N. Y. 63, 87 N. E. 798; *Sprague v. Blake*, 20 Wend. (N. Y.) 61). But it must take place before the contract is revoked. *Good v. Curtiss*, 31 How. Pr. (N. Y.) 4. And acts done after the commencement of the action are not competent evidence to prove acceptance and receipt. *Drake Hardware Co. v. Dewitt*, 142 App. Div. 189, 126 N. Y. S. 868.

CHAPTER IV.

SUBJECT-MATTER OF THE CONTRACT.

§ 86. EXISTING AND FUTURE GOODS. 1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this article called "future goods."¹

2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.²

3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.³

Effect of Section. The section is declaratory except that it abolishes the distinction between ordinary future goods and future goods having a potential existence, such as crops and the young of animals. No greater rights are created by an attempt to make a present sale of the latter than of the former under the Sales Act. See note on sub-section 3 below.

English Act. This section is practically identical with section 5 of the Sale of Goods Act. In *Ajello v. Worsley*, [1898] 1 Ch. 274, 77 L. T. N. S. 783, the court refused an injunction to prohibit advertising for sale goods not yet acquired. The court said (page 785): "I further think that the general rule that any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he hopes or expects to

acquire. * * * If a seller contract to sell future goods, he must be at liberty as a first step of such contract to offer them for sale." Reference is made in this case to section 5 of the Sale of Goods Act.

¹ **Subject Matter of Sale.** That a man may sell or contract to sell existing goods is axiomatic. It is also elementary that he may contract to sell goods not his own at the time of the making of the contract. *Wamsley v. Horton*, 77 Hun (N. Y.) 317, 28 N. Y. S. 423; *Stanton v. Small*, 5 Sandf. (N. Y.) 230. But he may not contract to sell goods belonging then to the buyer, or property which cannot be the subject of private ownership. *Wamsley v. Horton*, 77 Hun (N. Y.) 317, 28 N. Y. S. 423.

Apparently in *Currie v. White*, 45 N. Y. 822, an agreement to sell stock not yet acquired was given the effect of making the seller a quasi-trustee for the buyer.

For a definition of future goods similar to that given in this section see section 156, post.

² **Acquisition Depending on Contingency.** Instances of the application of the principle set forth in this sub-section are found in the so-called "sales to arrive" cases, in which the seller has agreed to sell goods if they arrive by a certain vessel. *Shields v. Pettie*, 4 N. Y. 122; *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329. The Sales Act works no change here.

³ **Effect of Attempted Present Sale of Future Goods.** The common law rule was, as to ordinary future goods, undoubtedly the rule set forth in this sub-section. *Burdick on Sales*, page 8; *Tiffany on Sales*, page 46; *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825, 88 N. W. 145, 56 L.R.A. 124.

Potential Goods. Crops.

But the common law recognized as far back as 1616, when the leading case of *Grantham v. Hawley*, Hob. (Eng.) 132, was decided, a special class of future goods, in which, by virtue of a so-called "potential existence," present rights could be given by a sale.

This doctrine has been followed in New York and it was stated in *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 575, 576, 37 N. E. 632, 40 Am. St. Rep. 635, thus: "One may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth

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cannot be said to have either an actual, or a potential existence before a planting." Hence it was held in that case that the chattel mortgaging of crops planted gave the mortgagee rights superior to those of a creditor taking the crops after maturity under an execution against the grower. For other cases allowing the present sale of crops having only a potential existence to create an interest in the crops when they mature, free from all equities arising since the sale, see *Andrew v. Newcomb*, 32 N. Y. 417; *Fleetham v. Reddick*, 82 Hun (N. Y.) 390, 31 N. Y. S. 342.

The principle was also applied to the sale of cheese to be made from the milk of cows owned by the seller. *Conderman v. Smith*, 41 Barb. (N. Y.) 404; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9.

Animals.

The same theory of potential existence has been applied to the young of animals sold during the period of gestation. *Andrews v. Cox*, 42 Ark. 473, 48 Am. Rep. 68; *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9, 13; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

Equitable Interest.

An agreement to give a person a mortgage on goods thereafter to be acquired results in giving the promisee an equitable right against the goods, when acquired, which will prevail against all except purchasers for value without notice. *Holroyd v. Marshall*, 10 H. L. Cas. (Eng.) 191; *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314, 62 N. E. 387. And it is probable that the same doctrine would be applied to sales, so that an attempted present sale of any goods not then in existence would result in giving the buyer an equitable right to the goods when they came into existence or were acquired, superior to all rights except those of purchasers for value without notice.

Potential Goods Abolished.

The Sales Act has, by its omission to make a special rule therefor, abolished the distinction between goods having a potential existence and other future goods. The draftsman of the act, Professor Williston, at page 166 of his work on Sales, states: "It seems, therefore, that the conclusion of the draftsman of the English Sale of Goods Act is sound, that 'There is no rational distinction between one class of future goods and another.' The American Sales Act, therefore, makes no exception to the general rule as to future goods in favor of goods of which the seller has potential possession. The buyer of such goods cannot acquire under the provisions of this act more than an equitable right." In law, therefore, under the Sales Act, a person making a present purchase of goods not yet acquired or in existence secures when the goods are acquired or come into existence,

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merely an action for breach of contract, if the seller fail to deliver, and not any legal right to the goods.

Mortgages.

It should be noted that mortgages are not affected by the Sales Act, so that the doctrine of potential existence may still be applied in connection with such transactions (See sec 155, post). By Laws of 1911, ch. 326 (Pers. Prop. Law, sec. 45; see appendix) a new method of creating liens on subsequently acquired property was established.

Bogert's Sales—3.

§ 87. **UNDIVIDED SHARES.** 1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.¹

2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.²

Effect of Section. The common law of New York is believed to be expressed in this section. See notes below.

English Act. The Sale of Goods Act contains no corresponding section, the English courts not adopting the view set forth in sub-section 2. *Gillett v. Hill*, 2 Crompt. & M. 530.

¹**Sale of Undivided Share.** This sub-section states an obvious rule of law. The difficulty of lack of definiteness of subject matter which is found in sub-section 2 does not occur here because the contract concerns only an undivided interest in a mass. No selection from the mass is necessary. In the situation indicated in sub-section 2 selection from the mass is necessary because a specific quantity is sold, hence the difficulty arising there as to how the selection shall be made and whether the title can pass before actual separation.

²**Sale of Goods in a Mass.** This subdivision is based on *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334, which is perhaps the leading case on the subject in this country. It was there held that,

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upon the sale of 6,000 bushels of wheat, its separation from a mass of 6,249 bushels, indistinguishable in quality or value, in which it was included, was not necessary to pass the title to the 6,000 bushels, when the intention that the title should pass was clearly manifested by the giving of a receipt by the seller in which he acknowledged that he held the 6,000 bushels in store for the buyer. The court expressed itself thus (page 333): "Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances."

Similarly in *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498, it was held that where a quantity of grain was stored in an elevator and the owner sold 400 bushels of it and delivered to the buyer a receipted bill of sale of that amount and an order for its delivery, signed by the person depositing the grain and drawn upon the elevator, there was a sufficient manifestation of an intention to pass the title to the grain without an actual separation, so that the buyer could not recover the price paid, when the grain was destroyed before he obtained actual possession of it.

And in *Crofoot v. Bennett*, 2 N. Y. 258, it was held that, where the owner of a brick yard sold to a buyer 43,000 bricks to be taken out of an unfinished kiln containing a larger quantity, delivered to the buyer formal possession of the yard, and burned the kiln for the buyer, the title passed to the buyer so that he might take the 43,000 bricks without being liable in trespass to a later purchaser of all the bricks in the kiln.

But if the seller is not at the time of the making of the contract the owner of the mass, or if the mass is not uniform in quality, obviously the title cannot pass, no matter how clearly the intent may be displayed. *Foot v. Marsh*, 51 N. Y. 288.

What Are Fungible Goods?

The doctrine applies only to fungible goods which are defined in section 156, post, as "goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit." The court in *Kimberly v. Patchin*, 19 N. Y. 330, 333, 75 Am. Dec. 334, referring to this class of goods, speaks as follows: "Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them."

Tenancy in Common.

Concerning the nature of the interest created in *Kimberly v. Patchin*, the court said at page 341 of the opinion: "It is unnecessary to de-

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cide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act: that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other."

This sub-section provides only that the title *may* pass in the case described. Without a clear expression of an intention to that effect the ordinary rule as laid down in sections 98 and 100, post, would apply and it would be presumed that the intention was that title should not pass till separation.

§ 88. DESTRUCTION OF GOODS SOLD. 1. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.¹

2. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.²

Effect of Section. "The section is believed to express the existing law." Notes of Commissioners on Uniform State Laws, American Uniform Commercial Acts, page 75.

English Act. Section 6 of the Sale of Goods Act is equivalent to the first subdivision of this section. The second subdivision is not found in the Sale of Goods Act.

¹ **Goods Wholly Destroyed.** The situation here met seems rarely to have been the subject of decisions, though there can be no doubt about the theoretical correctness of the law laid down. Subject matter is one of the elements of a contract of sale as essential as buyer and seller or price.

Illustrative and Analogous Cases.

In *Sherman v. Barnard*, 19 Barb. (N. Y.) 291, it was held that the sale of a canal contract was void, when, at the time of the supposed sale, the contract was unenforceable because of the unconstitutionality of the statute on which it depended. Where a cargo of corn is sold while supposed to be at sea, but the corn has

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been previously sold at an intermediate port, the second contract is void, and the seller cannot recover the contract price. The corn has ceased to exist so far as the parties to the second contract are concerned. *Hastie v. Couturier*, 9 Exch. (Eng.) 102. In *Allen v. Hammond*, 11 Pet. 63, 9 U. S. (L. ed.) 633, the court held an agreement to pay commissions for aiding in securing the allowance of a claim void, when the claim had already been allowed, without knowledge of the parties. The court put the case of the sale of a horse actually dead, though believed by the parties to be alive, with the inference that such a contract would be void (page 70). The sale of a right to manufacture a patented device is void when, without the knowledge of the parties, the application for the patent had been rejected at the time of the making of the supposed contract of sale. *Hamilton v. Park Co.* 125 Mich. 72, 83 N. W. 1018. A contract for the sale of a foal not in existence at the time of the making of the contract, but supposed by the parties to be alive, is void. *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249. A contract for the sale of a judgment is void, when the supposed judgment did not exist. *Gibson v. Pelkie*, 37 Mich. 380. Obviously, where both the parties know that the supposed subject-matter of the contract of sale is not in existence, there can be no contract and no recovery of the price agreed to be paid. *Wolf v. Di Lorenzo*, 22 Misc. 323, 49 N. Y. S. 191.

The textbook writers express the view set forth in this sub-section. Benjamin (7th ed.) § 76; Mechem, § 99; Williston, §§ 161-162; Burdick, p. 11; Tiffany, p. 45.

2 Partial Destruction or Deterioration. The English act affords no precedent for this sub-section. Almost no adjudication on the peculiar state of facts here presupposed seems to have taken place. In *Stone v. Frost*, 61 N. Y. 614, there was a sale of grape roots, for which the buyer paid the purchase price. When the goods were delivered, they were found to be dead and worthless, and the buyer tendered them back. Upon that showing he was allowed to recover the purchase price paid.

For a discussion of the theory upon which this sub-section is based, see Williston on Sales, section 162. It is true that the seller does not contract to deliver less than the contract amount, nor deteriorated goods, but he ought to have no ground of complaint if he is obliged to perform a smaller obligation than that which he assumed. On the other hand, the buyer ought not to be obliged to take anything less or inferior to what he contracted for, unless he so desire. If a separate price had been placed upon the goods left or left undeteriorated, then the contract would be divisible within the meaning of the sub-section.

§ 89. Destruction of Goods Contracted to Be Sold.

§ 89. DESTRUCTION OF GOODS CONTRACTED TO BE SOLD. 1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.¹

2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.²

Effect of Section. The section is expressive of the pre-existing law in this state. See notes below. On the risk of loss, see sec. 103, post.

English Act. Subdivision 1 is equivalent to section 7 of the Sale of Goods Act, but that act contains no provision analogous to subdivision 2. In *Nickoll v. Ashton*, [1900] 2 Q. B. 298, 82 L. T. N. S. 761, a case decided under the English act, it was held that where a seller agrees to ship goods by a certain vessel, during a certain month, and the ship is injured by perils of the sea so that she cannot be loaded during that month, the seller is not liable for nonperformance and the contract is at an end. Quoting

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section 7 of the English act, the justice delivering the opinion says: "It seems to me that the contention of the defendants is right, and that in the circumstances of this case the contract was at an end. It had become impossible of performance, and the condition ought to be implied that in the circumstances neither party was to be bound" (p. 764).

¹**Total Destruction of Goods.** The leading case in New York is *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415, in which it is held that where a contract is made for the sale of specific bales of cotton, which are destroyed by accidental fire before title has passed to the buyer, the seller is not liable to the buyer for damages for non-delivery. The court quotes with approval the statement of Blackburn, J., in *Taylor v. Caldwell*, 3 B. & S. 826, 113 E. C. L. 826, to the following effect: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." So in *Kein v. Tupper*, 52 N. Y. 550, it was held that destruction of the subject matter of a contract of sale relieves the seller from an action for damages for not performing the contract, but it does not enable him to enforce part performance against the buyer. Where cotton contracted to be sold is destroyed accidentally before the risk has passed to the buyer, he may recover advances made on the price. *Joyce v. Adams*, 8 N. Y. 291. Where grain contracted to be sold is destroyed accidentally, the seller is relieved from his obligation to deliver. *Curtiss v. Prinderville*, 53 Barb. (N. Y.) 186.

When the contract is to exchange notes for goods, and the maker of the notes becomes insolvent, the vendor of the goods is relieved from his obligation to deliver them. *Benedict v. Field*, 16 N. Y. 595; *Roget v. Merritt*, 2 Cai. (N. Y.) 117.

"Story in his work on Contracts, at page 1076, says: 'But in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that if the performance become impossible from the perishing of the person or thing, that shall excuse such performance.'" *Goldman v. Rosenberg*, 116 N. Y. 78, 83, 22 N. E. 259. For a similar expression relating to the general law of contracts, including sales, see *Stewart v. Stone*, 127 N. Y. 500, 507, 28 N. E. 595, 14 L.R.A. 215.

Destruction of Means of Supply.

Under a contract to manufacture cheese and butter, where it appears

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that the continued existence of the maker's factory was contemplated, the maker is relieved from the performance of the contract by the destruction of the factory by accident. *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L.R.A. 215. But the mere fact that the *seller* expected to use a certain mill for the purpose of making steel caps, will not, upon the destruction of that mill by accident, relieve him from his obligation to deliver the goods. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

² **Partial Destruction or Deterioration.** In *Automatic Time Table Advertising Co. v. Automatic Time Table Co.*, 208 Mass. 252, 94 N. E. 462, a case decided under the Massachusetts Sales Act, the court considered a contract to sell "12 automatic time-table machines complete." Six were delivered, but the balance, while incomplete, and in the seller's shop, were "greatly damaged" by fire. The court refers to the corresponding section of the Massachusetts Act in the following words (page 257): "The next contention of the defendant is that the fire of August 8 brought this case within St. 1908, c. 237, § 8, cl. 2, and that the plaintiff had to elect between avoiding the whole contract for all twelve machines or paying the whole price for the six the title to which passed to it at the date of the contract. It is not necessary to consider what the result would have been in the case at bar if the case had been brought within St. 1908, c. 237, § 8, cl. 2. The bill of exceptions went no further than to state that the 'fire greatly damaged the six machines standing in the defendant's premises,' and the statute applies where the specific goods perished after the contract was made or so greatly deteriorated in quality as to be substantially changed in character."

Professor Williston, the draftsman of the act, states that paragraph (b) of subdivision 2 is merely an application of the general doctrine of waiver to the law of Sales. *Williston on Sales*, p. 196.

See note 2, section 88, ante.

CHAPTER V.

THE PRICE.

§ 90. DEFINITION AND ASCERTAINMENT OF PRICE. 1. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.¹

2. The price may be made payable in any personal property.²

3. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this article shall not apply.³

4. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.⁴

Effect of Section. The section is declaratory of the common law except that it is in conflict with a few cases upon the nature of barter, and except that it seems to state in subdivision 3 a principle not always clearly recognized by the courts. See notes below.

English Act. Subdivisions 1 and 4 of the American act closely follow subdivisions 1 and 2, respectively, of Section 8 of the Sale of Goods Act. Subdivisions 2 and 3 of the American Act have no parallel passages in the English act. A barter is not governed by the same rules as a sale in England.

¹ Methods of Fixing Price. *A Price is Essential.* That there can be no sale without a price is rudimentary (see section 82, ante). The contract of sale is not a complete contract until the price is agreed upon, or a method of agreeing upon it fixed. *Reynolds v. Miller*, 79 Hun (N. Y.) 113, 29 N. Y. S. 405, affirmed 151 N. Y. 624, 45 N. E. 1134. A complaint for goods sold and delivered must allege the agreed price or the value of the goods, and if it fail to do so it is demurrable. *Sparks v. Ducas*, 123 App. Div. 507, 108 N. Y. S. 546; *Macksoud v. Dildarian*, 93 N. Y. S. 382.

Uncertainty as to Price.

A contract depending upon the subsequent mutual agreement of the parties as to one of its terms does not create a valid obligation. Where a party is bound only when he later agrees to a further term of the contract, he is really not obligated at all. *Mayer v. McCreery*, 119 N. Y. 434, 23 N. E. 1045. In an action for goods sold and delivered where the only issue is what the price was, and the complaint alleges that the goods were sold at "prices mutually agreed upon," the plaintiff cannot recover the market price but may show what it was for the purpose of proving what the price actually agreed upon was. *Vedder v. Leamon*, 70 App. Div. 252, 75 N. Y. S. 413.

A contract for the sale of ice is unenforceable because of indefiniteness of price, where the price is named as such a sum as will net the seller not more than \$1 a ton profit. *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313.

Price Capable of Being Fixed.

The price need not be named, if a criterion is fixed by which the price can be ascertained. "The price, it is true, was not absolutely fixed, but a standard or criterion was agreed upon, by which it should be fixed, and the amount realized by that criterion was the amount to be applied in part satisfaction of the debt. That is fixing the price sufficiently to make a sale valid." *Dixon v. Buck*, 42 Barb. (N. Y.) 70, 73 [overruled on another point in *Tallman v. American Express Co.*, 6 Hun (N. Y.) 377].

So where the price is to be fixed by the retention or non-retention of certain trustees in a corporation which was one of the parties to the contract, the price is capable of being made certain and the contract enforceable. *De Groff v. American Linen Thread Co.*, 21 N. Y. 124. So where the price is to be ten cents less than the Milwaukee price on any day the seller may name, a sufficiently definite criterion is established. *McConnell v. Hughes*, 29 Wis. 537. And the price may be contingent upon the value of gold at specified times. *Ames v. Quimby*, 96 U. S. 324, 24 U. S. (L. ed.) 635. And upon the sale of a cow, the price may be made dependent upon whether she prove to be with calf or not. *Newell v. Smith*, 53 Conn. 72, 3 Atl. 674.

Where a contract of sale fixes the price, but upon delivery the seller

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informs the buyer that he must pay an increased price or return the goods, and the buyer retains the goods, and orders others, he is liable for the increased price. *Stuart v. Manhattan Bath Tub Co.*, 34 Misc. 165, 68 N. Y. S. 816.

Where a contract fixes the price in the alternative, it may or may not be a gambling contract, depending upon whether the variation in price has any true relation to the value of the goods sold. *Deyo v. Hammond*, 102 Mich. 122, 60 N. W. 455, 25 L.R.A. 719.

² Sales and Exchanges. This sub-section brings the contract of barter or exchange within the scope of the Sales Act. The weight of authority at common law seems to have been to the effect that the two transactions were practically equivalent in effect. Thus in *Hudson Iron Co. v. Alger*, 54 N. Y. 173, a barter was considered a sale for the purpose of a revenue statute. And a contract to deliver dry goods and receive therefor nails was held in *Herrick v. Carter*, 56 Barb. (N. Y.) 41, to be a sale of the dry goods. In *Gallus v. Elmer*, 193 Mass. 106, 8 Ann. Cas. 1067, 78 N. E. 772, a transfer of merchandise in satisfaction of a pre-existing debt was held to be a sale within the act governing sales in bulk in Massachusetts.

On the other hand in *Massey v. State*, 74 Ind. 368, an indictment for selling liquor to a minor was held unsustainable by proof of an exchange of the liquor for chattels. And, under common law methods of pleading, assumpsit for goods sold and delivered could not be maintained on proof of an exchange of goods. *Slayton v. McDonald*, 73 Me. 50; *Mitchell v. Gile*, 12 N. H. 390.

The effect of the Sales Act in this regard is considered in *Cobb Co. v. Hills*, 208 Mass. 270, 94 N. E. 265, where the following statement appears at page 272 of the opinion: "If, as contended by the defendant, the walnuts were to be paid for by furnishing to the plaintiff as it might call for them other goods of equivalent value in which he dealt, there was upon the undisputed evidence a completed sale. Sales Act, St. 1908, c. 237, § 9."

The Statute of Frauds applies to contracts of barter and exchange as well as to contracts strictly for the sale of goods. *Raymond v. Colton*, 104 Fed. 219, 43 C. C. A. 501; *Bennett v. Hull*, 10 Johns. (N. Y.) 364; *Walrath v. Ingles*, 64 Barb. (N. Y.) 265.

³ Real Estate Consideration. Although this provision seems wise, in view of the different rules relating to real property, the courts do not seem always to have acted on the theory that the transaction should not be considered as a sale of goods, where the consideration for the transfer of the property in the goods was the conveyance of land. Thus in *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430, there was a sale of certain notes, the consideration being the conveyance of wild lands in Wisconsin, and the court treated the case as one of a sale of personalty and applied the rules relating to warranties of title on

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sales of personalty. And in *Dowling v. McKenney*, 124 Mass. 478, where real estate was exchanged for a monument, it was held that the transaction was governed by the same rules as a sale of personal property for money.

4 No Price Fixed. *Reasonable or Market Price.* "When an order is sent to a merchant or manufacturer for goods in which he deals, silent as to the price, and the order is accepted and executed, or simply accepted, the law fixes the price at the current rate at which they are sold, and the party ordering the goods is equally bound to pay this price as if it had been so stated in the order." *Konitzky v. Meyer*, 49 N. Y. 571, 575. The duty is said in *Shields v. Pettie*, 4 N. Y. 122, 125, to be to pay the "market value," and in *Regus v. Moran*, 9 N. Y. S. 927, to pay a reasonable price. Bids-submitted but not accepted are evidence of what the reasonable value of the articles sold were. *Lefurgy v. Stewart*, 69 Hun (N. Y.) 614, mem., 23 N. Y. S. 537. "The market-price is * * * a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition." *Carey Lith. Co. v. Magazine Co.*, 70 Misc. 541, 543, 127 N. Y. S. 300. For other cases in accord with the rule stated in this subsection, see *McEwen v. Morey*, 60 Ill. 32; *Taft v. Travis*, 136 Mass. 95; *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L.R.A. 770; *Althouse v. Alvord*, 28 Wis. 577.

§ 91.

Sale at a Valuation.

§ 91. SALE AT A VALUATION. 1. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.¹

2. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by the appropriate parts of this article.²

Effect of Section. The section is believed to be declaratory.

English Act. The Sale of Goods Act makes substantially similar provisions in its section 9, except that the words "without fault of the seller or the buyer" are not found in the first paragraph, and the injured party's remedy under subsection 2 of the English act is limited to damages, whereas the American act gives other remedies mentioned in sections 133-151, post.

¹ **Effect of Valuation Contracts.** *Validity of Contract Recognized.* The method of fixing the price here outlined is apparently not frequently used in this country, but the cases showing its operation are sufficiently numerous to make it certain that the use of this method results in a valid sale. Thus in *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339, it was held that when a lease provided that the buildings erected on the land by the tenant during the term should be valued by valuers at the end of the term, to determine the amount to be allowed the tenant therefor, and the valuers did determine upon an amount, that amount was binding upon landlord and tenant. And in *Bedell v. Kennedy*, 109 N. Y. 153, 16 N. E. 326, an agreement to divide the expense of a party wall according to the decision of two masons was held binding.

"Where parties to a contract agree to sell goods for the sale of goods

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agree that the price to be paid for the property shall be fixed by valuers appointed by them, there is no contract of sale if the persons appointed as valuers fail or refuse to act; and this is true even where one of the parties to such an agreement is the cause of such failure or refusal." *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 865, 50 S. E. 964.

"It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested, provided the interest was known, and no objection was made by the parties, and no fraud or bad faith is shown." *New England Trust Co. v. Abbott*, 162 Mass. 148, 153, 38 N. E. 432, 27 L.R.A. 271.

Failure to Make a Valuation.

"Contracts for sale at a valuation price, to be fixed by persons named, are impliedly conditional upon those persons surviving and making the valuation, and are terminated by their death before doing so, the valuation stipulated for, having thus become impossible." *Preston v. Smith*, 67 Ill. App. 613. *Accord*, *Hutton v. Moore*, 26 Ark. 382.

The English cases illustrate the principle that without valuation the contract of sale is void and inoperative. *Milnes v. Gery*, 14 Ves. Jr. 400; *Firth v. Midland R. Co.*, L. R. 20 Eq. 100; *Thurnell v. Balbirnie*, 2 M. & W. 786.

Quasi-Contractual Remedies.

Under the common law there was a quasi-contractual liability for the goods used by the buyer before the inability to secure a valuation became apparent. *Holliday v. Marshall*, 7 Johns. (N. Y.) 211, holds that there may be a recovery of the reasonable value of buildings left on land by a tenant when there has been a failure to secure a valuation of them, as per contract, due to the fault of the lessor. "Where the agreement has been executed by the delivery of the goods and the purchaser has done any act which prevents their valuation being fixed as the agreement provides, the vendor is entitled, in a proper action, to recover the value of the goods, estimated by the jury." *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 865, 50 S. E. 964. For similar holdings see *Clarke v. Westrope*, 18 C. B. 765, 86 E. C. L. 765, 25 L. J. C. Pl. 287; *Humaston v. American Tel. Co.*, 20 Wall. 20, 22 U. S. (L. ed.) 279; *Kenniston v. Ham*, 29 N. H. 501. An analogous situation arises in connection with insurance policies where the company refuses to provide for an arbitration required by the policy. In such an instance the courts allow recovery without arbitration. *Uhrig v. Williamsburgh City F. Ins. Co.*, 101 N. Y. 362, 4 N. E. 745; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. 844.

Unreasonable or Fraudulent Valuation.

A valuation of goods will not be set aside because the valuation made is unreasonable. There must appear to have been fraud or

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mistake in the making of the award. *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339. But fraud vitiates the approval. *Bigler v. New York*, 6 Hun (N. Y.) 239. See also *Brown v. Bellows*, 4 Pick. (Mass.) 189. Apparently the courts do not apply to this stipulation the principle maintained in connection with contracts providing for an architect's or other expert's certificate, namely, that the refusal to grant the certificate must be reasonable. *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L.R.A. 591, 17 Am. St. Rep. 634; *Thomas v. Stewart*, 132 N. Y. 580, 30 N. E. 577; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661.

² Failure to Secure Valuation Fault of Party. Obviously where the contract provides that the price is to be fixed by valuers to be selected by the parties, it is an implied term in the contract that each party shall take part in the selection, and if either party refuse to do so or in any other way prevent the valuers from coming into existence or acting, then the wrongdoer is guilty of a breach of the contract. If the title to the goods has passed to the buyer and the goods are still in the seller's possession or in transit, other remedies are open to the seller, if he be the injured party. For a statement of the relief available in this situation, see sections 133-151, post.

For cases in which valuation has been prevented by the act of one party, see *Vickers v. Vickers*, L. R. 4 Eq. (Eng.) 529; *Kenniston v. Ham*, 29 N. H. 501; *Holliday v. Marshall*, 7 Johns. (N. Y.) 211. See also *Burdick on Sales*, p. 30; *Williston on Sales*, pp. 213-214.

In England specific performance will not be granted where valuation has been prevented by the act of one party. *Wilks v. Davis*, 3 Meriv. 507; *Vickers v. Vickers*, L. R. 4 Eq. 529.

CHAPTER VI.

CONDITIONS AND WARRANTIES.

§ 92. **EFFECT OF CONDITION.** 1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition.¹ If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.²

2. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.³

Effect of Section. Due to the change in terminology explained below this section has a material effect on the pre-existing law of Sales. It gives a different connotation to the word "condition." See notes below.

English Act. Section 11 of the Sale of Goods Act covers a somewhat similar field, but the difference in the meaning of the word "condition" under the English act renders the act itself and the decisions under it of little or no use in the interpretation of the American act. Under the Sale of Goods Act "condition" indicates an essential obligation of the contract, as distinguished from an obligation collateral to the contract and known as a warranty. For Eng-

lish cases upon the subject of conditions, see *Kidston v. Monceau Ironworks Co.*, 86 L. T. N. S. 556; *Haegerstrand v. Anne Thomas Steamship Co.*, 10 Com. Cas. 67.

¹ Definition of Terms. Much difficulty arose at common law in the discussion of conditions and warranties from confusion of terms. It is believed that the Sales Act has greatly simplified the terminology, but the change may cause further embarrassment unless the meaning of condition and warranty under the Sales Act is carefully noted.

Conditions. Suspensory Condition.

At common law the New York courts recognized two classes of conditions, namely, (1) the pure, mere or suspensory condition, (2) the promissory or implied condition. The former is well defined by Tiffany (*Sales*, p. 229) as "an uncertain event or contingency on the happening of which the contract depends; there being no promise that the event shall happen." The happening or failure to happen of such a condition determines the existence or nonexistence of the entire contract. An illustration of such a condition is seen in *Shields v. Pettie*, 4 N. Y. 122, in which case there was an agreement to sell iron of a certain kind "on board Siddons." The court held that the parties were not bound unless iron of the kind described arrived by the vessel named; that such arrival was a pure or suspensory condition and without its occurrence the contract was at an end and neither party had an action against the other. *This is the only sense in which the word condition is used in the Sales Act*, namely, in the sense of an event which must transpire to make the contract enforceable, but concerning the transpiring of which there has been no promise.

Promissory Condition.

The second sense in which the New York courts used the word condition prior to the adoption of the Sales Act, was that of an implied promise forming an essential part of the contract itself and not collateral to it. This meaning is well illustrated in *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335, in which case the contract was for the delivery of "No. 1 extra foundry pig iron of the Coplay Iron Company (Limited) make," and it was held that it was a condition of the contract that goods of the kind described be tendered. Here the seller promises that the condition shall happen. He does not merely agree to perform if it happens.

The use of the word in this sense is shown in *Carleton v. Lombard*, 149 N. Y. 137, 147, 148, 43 N. E. 422, in the following quotation: "When an article is sold by the owner or maker by the particular description by which it is known in the trade it is a *condition precedent* to his right of action *Digitized by Microsoft®* which he has delivered, or offers

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to deliver, should answer this description. But in many cases in modern times the sale of a particular thing by terms of description has been treated as a warranty, and a breach of such a contract a breach of warranty, whereas it would be more correct to say that it was a failure to comply with the contract of sale which the party had engaged to perform. * * * The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty." The italics are the author's. See also *Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 U. S. (L. ed.) 393, for a similar use of the word.

Terminology in Sales Act.

Conditions in this last named sense of the word are termed implied warranties under the Sales Act. "In the Sales Act, therefore, and in this book, the word condition is never used in the sense of promise." Williston on Sales, p. 221.

In considering the effect of section 92 therefore, it must be borne in mind that the conditions there referred to are only those formerly known as pure or suspensory conditions.

The change above noted is in accordance with the policy of the act to divide obligations of this nature into two classes,—one involving a promise, express or implied, collateral or an essential term of the contract, and called a warranty; and the other involving a stipulation for performance upon the happening of an event, concerning the occurrence of which the seller makes no promise, called a condition.

Warranties.

At common law in New York warranties were divided into two classes,—express and implied. These names are used in the Sales Act with the same meaning except (1) that the term implied warranty now includes an obligation formerly called a condition in this state, namely, the obligation to furnish goods of the description sold, and (2) that the obligation arising on a sale by sample is now called an implied warranty (sec. 97, post), whereas at common law it was referred to as an express warranty. *Staiger v. Soht*, 116 App. Div. 874, 102 N. Y. S. 342, affirmed 191 N. Y. 527, 84 N. E. 1120.

The obligations of the seller concerning merchantability, fitness for purpose and title were at common law called implied warranties (*Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *McGiffin v. Baird*, 62 N. Y. 329; *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed no opinion, 188 N. Y. 619, 81 N. E. 1166), and continue to be so denominated under the act (sections 94 and 96, post.)

Effect of Condition. Illustrative Cases. At common law a condition of the suspensory kind (the only kind known to the Sales Act)

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had the effect described in the first sentence of this section. The following cases are illustrative: *Shields v. Pettie*, 4 N. Y. 122 (contract to sell iron of certain kind to arrive on certain boat; if both events did not happen buyer might treat contract at an end); *Higgins v. Delaware R. Co.*, 60 N. Y. 553 (delivery on time a condition of right to enforce the contract); *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703 (shipment during a given period a condition of right to demand acceptance); *Russell v. Nicoll*, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670 (arrival of goods in port during specified period a condition of right to enforce contract to buy); *Cunningham v. Judson*, 100 N. Y. 179, 2 N. E. 915 (condition that shipment be during a certain month is satisfied when, although the seller does not himself ship any goods, he buys a cargo shipped by another, after its shipment, such shipment having taken place during the required month); *Machson v. Syrop*, 91 N. Y. S. 12 (agreement to buy if a store showed a specified amount of business transacted is one on condition precedent); *Wilmerding v. Feldman*, 50 Misc. 341, 98 N. Y. S. 688 (performance of an agreement not to sell goods to others than buyer is a condition precedent to maintaining an action for price); *Smith v. Briggs*, 3 Den. (N. Y.) 73 (payment conditioned on furnishing of architect's certificate; no action on contract till it is furnished); *Steinhardt v. Bingham*, 182 N. Y. 326, 75 N. E. 403 (giving of notice of shipment a condition precedent to demanding acceptance). Where the performance of an act by one party is a condition precedent, and the obligee prevents the performance of that act, he cannot insist upon its performance as a condition precedent to his liability. *Gallagher v. Nichols*, 60 N. Y. 438.

Agreements to Satisfy the Buyer.

A common form of sale is one upon condition that the buyer be satisfied with the goods. The condition is here a suspensory condition and one of the kind continued under the Sales Act as conditions. The cases cited below illustrate the principle.

If the contract be not one to gratify a personal taste, the law will hold that a contracting party is satisfied with what he ought to be satisfied with. The following were cases involving contracts not calling for an exercise of personal taste: *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709 (altering boiler); *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L.R.A. 554, 15 Am. St. Rep. 398 (contract to polish and stain woodwork); *Russell v. Alerton*, 108 N. Y. 288, 15 N. E. 391 (contract to fit out ship with ventilating apparatus); *Hummell v. Stern*, 21 App. Div. 544, 48 N. Y. S. 528, affirmed 164 N. Y. 603, 58 N. E. 1088 (contract to sell and install ventilating machinery). On the other hand, the following cases have held that the contracts there involved did concern the personal taste of the buyer and that there must be a satisfaction of the buyer, regardless of the reasonableness of his conduct: *Crawford v. Mail Pub. Co.*, 163 N. Y. 404, 57 N. E. 616

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(contract to write newspaper articles); *Hoffman v. Gallaher*, 6 Daly (N. Y.) 42 (contract to paint portrait); *Haven v. Russell*, 34 N. Y. S. 292 (contract to write a play).

That the condition may be waived, is an obvious rule of the law of contracts. *Delafield v. De Grauw*, 3 Keyes (N. Y.) 467; *Gray v. Delaware R. Co.*, 48 Super. Ct. (N. Y.) 121.

² Condition Coupled with Promise. Apparently *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329, applies a rule similar to that set forth in the second sentence of the first sub-section. In that case the seller agreed to sell goat skins of a certain grade, "to arrive" from China, and the contract contained the following clause: "Goods to be shipped immediately by steamer or steamers to New York." The court held that there was not only a condition that the skins should arrive, but also a promise on the part of the seller that they should be shipped so as to arrive, and that therefore the seller was liable in damages. The court says (p. 106): "But the principle that if the goods specified and described in the contract do not arrive, a condition which terminates the contract exists and the seller is not liable, has no application where the contract contains either a warranty that the shipment has been made, or an express agreement upon the part of the seller to make shipment of goods described. In the latter case the contract is an existing and continuing one, and its provisions as to the quality of the goods are not only conditions precedent to any obligation upon the part of the buyer to accept them, but where the seller fails to ship goods of the quality required, the buyer is also entitled to such damages as he sustains by reason of such failure." Citing *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703; *Eppens Co. v. Littlejohn*, 27 App. Div. 22, 50 N. Y. S. 251, affirmed 164 N. Y. 187, 58 N. E. 19, 52 L.R.A. 811. See also *Dike v. Reitlinger*, 23 Hun (N. Y.) 241.

³ Option to Treat Warranty as Condition. Concerning this sub-section Professor Williston says (*Sales*, p. 221): "The buyer's promise is indeed impliedly conditional on the performance by the seller of his promise, and this is so provided in sub-section (2) of the section of the Sales Act under consideration * * *." Apparently the subdivision is intended merely to express the principle that the buyer's obligation to accept and pay is conditioned upon the seller's obligation to deliver goods of the kind described and warranted. The buyer need not perform if the seller does not.

§ 93. DEFINITION OF EXPRESS WARRANTY. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.¹ No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.²

Effect of Section. This section is believed to be declaratory of the common law, except that the rule regarding statements as to value seems to have been less iron clad than that laid down in the section. See note 2, below.

English Act. The Sale of Goods Act does not define an express warranty. It was held in *Hyslop v. Shirlaw*, Sc. Ct. Sess. 7 F. 875, that the description of pictures as "by" a certain artist did not constitute an express warranty of the genuineness of the paintings.

¹ **The Elements of an Express Warranty.** *Intent.* "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." *Hawkins v. Pemberton*, 51 N. Y. 198, 202, 10 Am. Rep. 595.

Phraseology.

"There is no particular phraseology necessary to constitute a warranty." *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440. There must be "an express and direct affirmation of the quality and condi-

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tion of the thing sold." *Chapman v. Murch*, 19 Johns. (N. Y.) 290, 291, 10 Am. Dec. 227. See also *Egbert v. Hanford Produce Co.*, 92 App. Div. 252, 86 N. Y. S. 1118.

Where a warranty is made after delivery of the goods, but before acceptance of them, the acceptance is sufficient consideration to support a warranty. *Luckes v. Meserole*, 132 App. Div. 20, 116 N. Y. S. 350.

"No particular phraseology is required to constitute a warranty. 'It must be a representation which the vendee relies on and which is understood by the parties as an absolute assertion, and not the expression of an opinion.' * * * It is not necessary that the vendor should have intended the representation to constitute a warranty." *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 265, 23 N. E. 372, 16 Am. St. Rep. 753.

Reliance.

"It is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on." *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 App. Div. 300, 302, 51 N. Y. S. 793, affirmed 164 N. Y. 593, 58 N. E. 1086.

Time of Warranty.

Generally a warranty of an article sold should be made at the time of the sale; but if, when the parties are in treaty respecting the sale the owner offers to warrant the article, the warranty will be binding although the sale does not take place until several days thereafter. *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584. Where goods are ordered "same as sent," a warranty made regarding the first lot attaches to the second. *Moore v. King*, 57 Hun (N. Y.) 224, 10 N. Y. S. 651, affirmed 134 N. Y. 596, 31 N. E. 624. See also *Empire State Bag Co. v. McDermott*, 89 App. Div. 234, 85 N. Y. S. 787; *Shull v. Ostrander*, 63 Barb. (N. Y.) 130.

A warranty relates to the date of its making, in the absence of express limitation. *Pierson v. Hoag*, 47 Barb. (N. Y.) 243.

Promissory Warranties.

Section 93 refers to "any promise" having certain qualities as a warranty. In *Miller v. F. R. Patch Mfg. Co.*, 101 App. Div. 22, 91 N. Y. S. 870, it was held that a statement that a derrick for use in a particular place would require a load of 250 tons to break it, was valid as an express warranty. And in *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388, a similar holding is found regarding a representation that seed peas would "pick four or five days earlier than any other seed on the market."

Scienter.

Knowledge of the falsity of his representation is not an essential of the seller's warranty. *Lewis v. Doyle*, 13 App. Div. 291, 43 N. Y. S.

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201; *Fowler v. Anderson*, 132 App. Div. 603, 116 N. Y. S. 1092. The good faith of the seller is no defense to an action for breach of warranty. *Brisbane v. Parsons*, 33 N. Y. 332. Where the buyer alleges fraud on the part of the seller, he cannot recover on proof of breach of warranty. *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562.

Sale Must Be Complete.

"A warranty, is an incident only of consummated or completed sales, and has no place as a contract, having present vitality and force in an executory agreement of sale." *Osborn v. Gantz*, 60 N. Y. 540, 543. A warranty cannot exist unless there is a "completed sale and absolute delivery." *Levis v. Pope Motor Car Co.*, 202 N. Y. 402, 95 N. E. 815. But warranties apply equally to executory as well as executed contracts of sale. *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719. The obligation to deliver the goods and the obligation under the express warranty are distinct. *Blaisdell Machinery Co. v. Brasher Breakwater Co.*, 70 Misc. 257, 126 N. Y. S. 634.

Burden of Proof.

Where an implied warranty is presumed to exist, the burden of proving that it did not exist is on the seller. Where an express warranty is alleged the burden of proving its existence is on the buyer, it being an affirmative defense. *Turl v. Williams Engineering Co.*, 136 App. Div. 710, 121 N. Y. S. 478.

Express Warranty: Illustrative Cases.

The following cases illustrate the attitude of the courts toward the question as to what is an express warranty: *Fiss Horse Co. v. Schwartzchild*, 121 N. Y. S. 292 (statements that horse was well broken, single or double, and that seller thought it would fill the bill are merely expressions of opinion and not warranties); *Lichtenstein v. Rabolinsky*, 98 App. Div. 516, 90 N. Y. S. 247, affirmed 184 N. Y. 520, 76 N. E. 1099 (statement that iron was "good, clean busheling scrap" a warranty); *American Writing Mach. Co. v. Bushnell*, 9 Misc. 462, 30 N. Y. S. 228 (calling attention to late number on typewriter a warranty that it is of recent make); *Cook v. Moseley*, 13 Wend. (N. Y.) 277 (statement that horse is not lame and that seller would not be afraid to warrant him a warranty); *Smith v. Servis*, 58 Hun (N. Y.) 601, 33 N. Y. St. Rep. 432 (agreement to finish furniture in "good, workmanlike manner" not a warranty).

Known Defects.

"It is also well settled that a warranty, even in an executed contract, does not extend to known defects." *Studer v. Bleistein*, 115 N. Y. 316, 324, 22 N. E. 243, 5 L.R.A. 702. See also *Day v. Pool*, 52 N. Y. 416, 420, 11 Am. Rep. 719; *Bennett v. Buchan*, 76 N. Y. 386; *Schuyler v. Russ*, 2 Cai. (N. Y.) 202; *Birdseye v. Frost*, 34 Barb. (N. Y.) 367.

Warranties by Agent.

"An agent employed to sell, without express power to warrant, can-

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not give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty." *Smith v. Tracy*, 36 N. Y. 79, 82. See also *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Whitman v. Jacobson*, 119 N. Y. S. 246. There must be custom or express authority. *Cafre v. Lockwood*, 22 App. Div. 11, 47 N. Y. S. 916. See also *Levis v. Pope Motor Car Co.*, 202 N. Y. 402, 95 N. E. 815. The enforcement of the contract or the acceptance of the benefits of the sale makes the principal liable for unauthorized warranties. *Elwell v. Chamberlin*, 31 N. Y. 611, 619; *Washburn v. Rainier Co.*, 130 App. Div. 42, 114 N. Y. S. 424.

Ordinarily an agent warranting goods for a known principal is not liable for a breach of the warranty, but he may, for a separate consideration, bind himself by a warranty. *Dahlstrom v. Gemunder*, 198 N. Y. 449, 19 Ann. Cas. 771, 92 N. E. 106. The selling agent of a disclosed principal is personally liable for the breach of an unauthorized warranty. *Luckes v. Meserole*, 132 App. Div. 20, 116 N. Y. S. 350. A seller dealing with an agent acting for an undisclosed principal is liable to the principal on an implied warranty. *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 136 App. Div. 22, 120 N. Y. S. 163.

Written Contract: Parol Warranty.

Where the parties have reduced a contract of sale to writing in such terms as to show that they intend it to be a complete statement of their obligations, an additional express warranty cannot be shown by parol. *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 12 S. Ct. 46, 35 U. S. (L. ed.) 837; *Eighmie v. Taylor*, 98 N. Y. 288. But if the writing does not purport to cover the whole contract, an express warranty outside of it may be shown. *Filkins v. Whyland*, 24 N. Y. 338; *Briggs v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Lesin v. Shapiro*, 147 App. Div. 100, 131 N. Y. S. 755; *Gelb v. Waller*, 115 N. Y. S. 201. And an independent, collateral agreement may be shown. *Vaughn Mach. Co. v. Lighthouse*, 64 App. Div. 138, 71 N. Y. S. 799. An implied warranty may be attached to a written as well as an unwritten contract of sale. *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422.

² **Statements of Value and Opinion.** *Illustrative Cases.* Examples of expressions of opinion held not to be warranties are found in the following cases: *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428 (that hogs were suitable and proper for the New York City market); *Ginsberg v. Lawrence*, 121 N. Y. S. 337 (that a machine was in very good condition); *Stumpp Co. v. Lynber*, 84 N. Y. S. 912 (that roses were very fine stock); *St. Hubert Guild v. Quinn*, 64 Misc. 336, 118 N. Y. S. 582 (that books were very fine reading matter, fit for everybody to read); *League Cycle Co. v. Abrahams*, 27 Misc. 548, 58 N. Y. S. 306 ("we are confident that it is an article unsurpassed and unsurpassable"); *Lawton v. Keil*, 61 Barb. (N. Y.) 558 (that seller had

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bought corn from another as sound corn and would sell it as such).
Value.

"It is well settled that a mere naked representation by a vendor of the value of property sold is to be regarded as an expression of opinion merely. * * * But a vendor may give a warranty as to value as in respect of any other fact, and if he makes a representation as to value, which is intended as a warranty, and it enters as a constituent element into the transaction, it will then become a part of the contract and may be enforced as a warranty." *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228. In this case it was held that statements regarding the value of corporate stock were warranties. And a statement as to the cost price of certain stock has been held to be a warranty. *Petty v. Fish*, 31 Misc. 739, 63 N. Y. S. 192. Also a representation that flour was superfine flour and worth a shilling a barrel more than other kinds has been held a warranty. *Carley v. Wilkins*, 6 Barb. (N. Y.) 557.

§ 94. IMPLIED WARRANTIES OF TITLE. In a contract to sell or a sale, unless contrary intention appears, there is

1. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;¹

2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;²

3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.³

4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.⁴

Effect of Section. The section is believed to be declaratory of the common law, except (1) that it apparently abolishes the peculiar New York rule that there was no implied warranty of title when the seller was not in possession of the goods at the time of the making of the contract, (2) that it gives a cause of action for breach of warranty of title at the time of the making of the contract, when the seller's title is defective, rather than at the time of actual disturbance of the buyer's possession, and (3) that it separates the old warranty of title into three parts,—right to sell, quiet possession and freedom from encumbrances. See notes below.

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English Act. Section 12 of the Sale of Goods Act covers the same ground with but slight variations. Sub-section 4 is found in the American act only.

¹ **Warranty of Right to Sell.** *Theory of Warranty.* This being the first of the sections upon implied warranties, it may be appropriate to call attention to the New York theory of implied warranties, as set forth in *Hoe v. Sanborn*, 21 N. Y. 552, 564, 78 Am. Dec. 163: "Implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud. It is for the sake of convenience, merely, that this obligation is permitted to be enforced under the form of a contract."

Common Law Continued.

"In every case of a sale of personal property there is an implied warranty of title, and this is analogous to a covenant for quiet enjoyment of land. * * * The effect of such a warranty is to guarantee the purchaser against eviction or injury from other parties." *McGiffin v. Baird*, 62 N. Y. 329, 331. For other cases sustaining the doctrine of sub-section 1, see *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *McClure v. Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L.R.A. 153; *Gallagher v. Waring*, 9 Wend. (N. Y.) 20, 27; *Defreeze v. Trumper*, 1 Johns. (N. Y.) 274, 275, 3 Am. Dec. 329; *Vibbard v. Johnson*, 19 Johns. (N. Y.) 77, 79. It is obvious that the obligation of a seller to deliver is not satisfied by the tender of goods of which he is not the owner or which are encumbered. *Croninger v. Crocker*, 62 N. Y. 151.

Choses in Action.

This implied warranty of title extends to sales of choses in action as well as of ordinary chattels. *Akin v. Meeker*, 78 Hun (N. Y.) 387, 29 N. Y. S. 832, affirmed 149 N. Y. 610, 44 N. E. 1120; *Herzog v. Heyman*, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646; *McClure v. Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L.R.A. 153.

Remote Vendors.

The implied warranty of title allows the vendee to resort only to his immediate seller. The lack of privity prevents an action against a remote vendor. The analogy of covenants of title to land does not apply. *Bordwell v. Collie*, 45 N. Y. 494.

Possession by Seller.

It is submitted that this section alters the common law in one respect, namely, in that it implies a warranty of title regardless of the possession or lack of possession of the goods by the seller, whereas the common law implied no warranty of title where the seller was out

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of possession. Thus in *Scranton v. Clark*, 39 N. Y. 220, 224, 100 Am. Dec. 430, it is stated that "possession by a vendor of chattels is equivalent to an affirmation of title, and, in such case, the vendor is held to an implied warranty of title, even although nothing be said on the subject between the parties. But, if the property sold be at the time of the sale in the possession of a third party, and there be no affirmation or assertion of ownership, no warranty of title will be implied. In these circumstances, in order to attach any liability to the vendor upon a sale, there must be an affirmation which will amount to a warranty of the title."

This doctrine was also laid down in *McCoy v. Artcher*, 3 Barb. (N. Y.) 323; *Edick v. Crim*, 10 Barb. (N. Y.) 445; *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 533. But possession of a sample was sufficient possession of the bulk to cause a warranty to be implied. *Lister v. Windmuller*, 52 Super. Ct. (N. Y.) 407. For criticisms of this peculiar New York doctrine, see *Whitney v. Heywood*, 6 Cush. (Mass.) 82; *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64. It would seem that, by its failure to mention any exception to the general rule that a warranty of title is implied, the Sales Act implies such a warranty regardless of the possession of the goods by another than the seller.

Partial Failure of Title.

Where title to only part of the property sold fails, the buyer need not rescind the whole contract but may retain the part as to which title is good and recover damages for the failure of title as to the balance. *McKnight v. Devlin*, 52 N. Y. 399, 11 Am. Rep. 715. Where "there is a total failure of title on the part of the vendor the vendee may rescind and recover back his advances (*Story on Sales*, § 203), or he may abandon the property to the true owner, taking upon himself the onus of proving title in such owner." *Wolf v. Michael*, 21 Misc. 86, 46 N. Y. S. 991.

Time of Breach.

Two questions arise under this subdivision. The first is, When is the warranty breached? The second is, What is the measure of damages for its breach?

As to the time of breach, the New York courts seem to have regarded the warranty of title as analogous to the covenant of quiet enjoyment in the case of a sale of land, and to have held that *no cause of action arises* until the buyer is disturbed in his possession. The mere fact that at the time of the sale the seller was not the owner did not at common law create a breach of the warranty of title. *Sweetman v. Prince*, 26 N. Y. 224, 233; *O'Brien v. Jones*, 91 N. Y. 193, 199; *Case v. Hall*, 24 Wend. (N. Y.) 102, 103, 35 Am. Dec. 605; *Converse v. Miner*, 21 Hun (N. Y.) 367.

It is believed that under the Sales Act a cause of action arises at

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the time of the completion of the contract if the seller is not the owner of the goods, and that the buyer need not wait for disturbance in possession or actual damage. Such is the view of the draftsman of the act, Professor Williston. See Williston on Sales, p. 294. Such would also seem to be the view of the Massachusetts court in *Hartley v. Rotman*, 200 Mass. 372, 376, 86 N. E. 903, a case not directly involving the construction of the Sales Act because the facts arose prior to its passage, but in which the section of the Sales Act was referred to as having the suggested effect.

The reason for believing that under the act the cause of action arises at the time of the contract is that a separate cause of action is given by the section for breach of a warranty of right to enjoy quiet possession (see sub-section 2). The intent would seem to be to make one cause of action arise from mere failure of title, and another arise from disturbance of possession. The separation of the two warranties would seem to indicate an intent to drop the requirement in the case of warranty of title that quiet possession be disturbed.

Measure of Damages.

This change as to the time of the arising of the cause of action, however, is of little practical importance unless the rule as to damages has been changed, for the New York courts would, at common law, give the buyer none except actual damages. *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *McGiffin v. Baird*, 62 N. Y. 329; *Cahill v. Smith*, 101 N. Y. 355, 4 N. E. 739. The measure of damages is stated under the Sales Act (see sec. 150, post) to be "the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty." It seems probable that the New York courts will not change their standard of damages under this definition, but will, while possibly allowing nominal damages for breach of the warranty of right to sell, insist that the buyer cannot recover as damages the purchase price paid and consequential damages until he has been deprived of the goods or their value. If this be the construction given to the section, no action of practical importance will arise until quiet possession has been disturbed.

The Massachusetts rule at common law regarding the time of the origin of the action was that believed to be stated in the act. *Grose v. Hennessy*, 13 Allen 389.

Outline of Remedies.

It is suggested that the following outline of the remedies open to the buyer at common law in case of failure of the title of the seller is justified by the cases cited under the five paragraphs immediately preceding and by *Forgotston v. Cragin*, 62 App. Div. 243, 70 N. Y. S. 979; *National Metal Edge Box Co. v. Gotham*, 125 App. Div. 101, 109 N. Y. S. 450; *Barasch v. Kramer*, 62 Misc. 475, 115 N. Y. S. 176; *Vib-*

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bard v. Johnson, 19 Johns. (N. Y.) 77; Akin v. Meeker, 78 Hun 387, 29 N. Y. S. 132, affirmed 149 N. Y. 610, 44 N. E. 1120:

Buyer in Possession.

(a) Third person claims goods and buyer believes seller was not the owner. No recovery for breach of warranty of title and no defense to action for price on these facts. (b) True owner has recovered judgment against buyer for value of goods. If the judgment remains uncollected, no remedy for buyer. If the judgment has been collected from the buyer, he may recover the loss from the seller by proving the collection of the judgment and that title was in its collector. But if the seller had notice to defend the action against the buyer, then the buyer, in his action against the seller, need prove only the collection of the judgment against him, and not the title in the third party. (c) Buyer has, without suit, paid claim made against him by true owner of the goods. Here there has been a breach of the warranty of title and the buyer may recover by proving payment of the claim and that the title was in the third person to whom he paid the claim, or at least was not in his vendor.

Buyer Out of Possession.

(a) Buyer has voluntarily surrendered the goods to the true owner either upon or without demand. There is a breach of the warranty of title and the buyer may recover upon it by proof of the surrender and that the title was in third party, not the seller. (b) Goods have been taken from buyer by true owner by replevin. Has been breach of warranty of title and buyer may recover or defend upon it by proving that goods were taken from him and that title was in third party. But apparently if buyer gives the seller notice of the replevin suit, the buyer need not, in his action against the seller, prove that title was in third party.

The Sales Act would seem to affect these options only as it alters the time of the arising of the cause of action for breach of warranty of right to sell.

² **Quiet Possession.** As explained in note 1 above, this warranty was not at common law separated from that of title. All three implied warranties mentioned in this section were, in fact, considered as one. Thus in Dresser v. Ainsworth, 9 Barb. (N. Y.) 619, where the defense to an action for the price of horses and a cart was that they were taken from the buyer under an execution against the seller in pursuance of a levy made before the sale, the court said: "The essence, then, of the contract of warranty in the present case was, that the vendor had a perfect title to the goods sold, at the time of the sale; that the same were unencumbered, and that the vendee should acquire, by the purchase, a title free and clear, and should enjoy the possession without disturbance by means of anything done or suffered by the vendor" (p. 626). Probably no substantial practical effect arises from separat-

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ing into three warranties the three elements formerly found in the one warranty of title.

³ **Freedom from Encumbrance.** The remarks made under note 2 above are applicable here also. The warranty against encumbrances was at common law considered a portion of the warranty of title. See *Bordwell v. Collie*, 45 N. Y. 494; *McClure v. Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L.R.A. 153. Probably no practical effect will result from the separation of the integral parts of the warranty of title, and the making of three warranties from one.

⁴ **Judicial Sales.** The principle of this subdivision is one recognized at common law. Thus in *Cohn v. Ammidown*, 120 N. Y. 398, 24 N. E. 944, it was held that there was no warranty of title upon the sale of property by a trustee under a mortgage, the court saying: "An affirmation of title is implied when one sells chattels in his possession, unless the facts and circumstances of the sale show that he did not intend to assert title of ownership in himself, but simply to transfer such interest as he has. In this case it very clearly appears that these defendants did not assume to warrant the title, and the circumstances were such that a personal warranty of title cannot be implied as against them" (pp. 401-402). The principle is also recognized in *Hoe v. Sanborn*, 21 N. Y. 552, 556, 78 Am. Dec. 163.

In *Shepard v. Earles*, 13 Hun (N. Y.) 651, the sale had been made under a chattel mortgage and it was held that there was no warranty of title, the court saying (p. 653): "But when the sale is made by an officer or trustee no warranty of title is implied. (1 Chitty on Con., 626, note 10). It seems to me that a warranty of title of property sold by virtue of a chattel mortgage should not be implied against the mortgagee. The proceeding is notice to the public that he is not selling his own title to the property, but the title he acquired through the mortgage."

§ 95. Implied Warranty in Sale by Description.

§ 95. IMPLIED WARRANTY IN SALE BY DESCRIPTION. Where there is a contract to sell or a sale of goods by description,¹ there is an implied warranty that the goods shall correspond with the description² and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.³

Effect of Section. This section is believed to work no change in the pre-existing law, except in the matter of terminology, namely, the change of the name of the obligation from condition to warranty. See note 2, below.

English Act. Section 13 of the Sale of Goods Act corresponds with this section, except in unimportant details.

In *Bostock v. Nicholson*, [1904] 1 K. B. 725, 91 L. T. N. S. 626, it was held that where a manufacturer of sulphuric acid contracted to sell sulphuric acid commercially free from arsenic, there was a sale by description and an implied obligation (called a condition under the English act) that the goods would correspond to the description, and the implied engagement was breached when the acid contained arsenic in such quantities as to render brewing sugar manufactured with it poisonous.

In *Varley v. Whipp*, [1900] 1 Q. B. 513, it was held that where a seller states that he has a machine at Upton, which is a self-binder, nearly new and only used to cut about fifty or sixty acres, and the buyer does not see the machine at the time of the contract, there is a sale by description and an implied obligation (called a condition under the English act) that the machine shall correspond to the description. At page 516 of the opinion the court,

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referring to the corresponding section of the English act, says: "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present, where the buyer has never seen the article sold, but has bought by the description. * * * The most usual application of that section no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description." For a criticism of this definition of "sale by description" see Williston on Sales, p. 296.

¹ What is a Sale by Description? For the English definition of this variety of sale, see the next preceding note. Professor Williston defines it as follows: "The term should be confined to cases where the identification of the goods which are the subject-matter of the bargain depends upon the description." (Williston on Sales, p. 296). Reference is made to the cases cited below under this section for the purpose of showing what the New York courts have regarded as sales by description.

² Nature of Obligation. Terminology. At common law the obligation was considered an essential term of the contract, a condition, and not a collateral obligation in the nature of a warranty. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 236, 15 N. E. 335; *Carleton v. Lombard*, 149 N. Y. 137, 147, 148, 43 N. E. 422. As explained in the notes under section 92, ante, warranties under the Sales Act are not confined to collateral obligations but include all promissory obligations. This change in terminology is not believed to be important. Other sections of the act, however, have greatly enlarged the remedy open upon a breach of this obligation. See sections 130 and 150, post.

Early Rule.

The early New York cases applying the strict rule of *caveat emptor*, with no exceptions, have long been discarded. The early tendency is shown in *Seixas v. Woods*, 2 Cai. (N. Y.) 48, 2 Am. Dec. 215, and *Swett v. Colgate*, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266.

Illustrative Cases.

The working of the rule laid down by this section is illustrated by the following cases: *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595 (on sale of article described as "blue vitriol" there is an

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implied obligation to furnish blue vitriol, which is breached by furnishing green and blue vitriol mixed); *Dounce v. Dow*, 64 N. Y. 411 (implied obligation that goods shall correspond with description on sale of iron as "xx pipe iron"); *Newbery v. Wall*, 65 N. Y. 484 (contract to sell "good Dowrah jute"); *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136 (sale of Van Wycklin's Early Flat Dutch cabbage seed); *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 (sale of seed as "large Bristol cabbage seed" implied an obligation to furnish seed of that kind); *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345 (Connecticut tobacco); *Depew v. Peck Hardware Co.*, 121 App. Div. 28, 105 N. Y. S. 390, affirmed 197 N. Y. 528, 90 N. E. 1158 (sale of alfalfa seed); *Abel v. Murphy*, 43 Misc. 648, 88 N. Y. S. 256 (sale of fruit as "grape fruit"). In all these cases the obligation of the seller was to furnish goods of the kind described, and his failure to do so entitled the buyer to reject the goods.

³ Sale by Sample and Description Both. Apparently the common law doctrine upon this subject was the same as that laid down in the latter part of section 95. Thus in *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345, tobacco was sold as Connecticut tobacco and guaranteed to be equal to sample. It was there held that both requirements must be met,—the goods must be equal to sample and of the kind described. See also *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L.R.A. 213, 14 Am. St. Rep. 455; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L.R.A. 702.

A New Jersey case (*Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67), decided since the enactment of the Sales Act in that state, approves this principle and states: "The same rule of law is stated in the Sales Act of 1907 (Pamph. L., p. 316, § 14). This act did not take effect until after the transactions now in question, but it was a mere codification of the then existing law in this respect" (p. 89).

"A sale, however, may be made partly by description and partly by sample, and in that event the goods must correspond to the description in the respect covered thereby and to the sample in other respects." *Henry v. Talcott*, 175 N. Y. 385, 390, 67 N. E. 617.

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§ 96. IMPLIED WARRANTIES OF QUALITY.

Subject to the provisions of this article and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:¹

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.²

2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.³

3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.⁴

4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.⁵

5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.⁶

6. An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.⁷

important changes in the law of warranty which may be summarized as follows: (1) The distinction between the ordinary dealer and the manufacturer or grower is abolished and the warranty of fitness for purpose extended to all sellers; (2) the manufacturer's liability of fitness for purpose is no longer dependent on negligence, actual or presumed, but is an absolute liability; (3) the special rule regarding the sale of provisions for immediate human consumption is abolished and a warranty of fitness of food for any purpose is to be found under the same circumstances as a similar warranty in the case of the sale of other goods; (4) the warranty of merchantability is limited to dealers in goods of the description sold and is extended to present sales by description, instead of being confined to executory sales; (5) actual inspection is required to exclude an implied warranty as to obvious defects, whereas the common law excluded such a warranty where there was opportunity for inspection or actual inspection; (6) the Sales Act allows an implied warranty to be annexed by usage, whereas the common law in this state did not; (7) the Sales Act provides that an express warranty does not exclude an implied warranty, unless inconsistent therewith, whereas there is authority for the contrary position at common law.

Curiously enough the New York courts have in effect discussed this section, for in *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed without opinion 188 N. Y. 619, 81 N. E. 1166, the Appellate Division in the Fourth Department referred to the corresponding section of the English act, which is practically identical, and state (p. 580): "So far as this English statute goes, it does not seem, as said by Justice Williams, to have altered to any great extent the rules of the common law, but has codified them so far as such a

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codification is possible, and has abolished the distinction between the manufacturer and a seller not a manufacturer, under certain circumstances, which at common law really placed them upon the same footing."

"This section follows section 14 of the English Act. As originally drafted sub-section (1) was limited to the case where the seller was the grower or manufacturer, in conformity with the probable weight of authority. See *Mechem*, §§ 1314-1318. The rule in New York is still more restricted, and does not hold even a grower or manufacturer liable if the defect was due to latent defects in the material purchased and there was no negligence. *Hoe vs. Sanborn*, 21 N. Y. 552. See also California Code, § 1769. (See contra, *Randall vs. Newson*, 2 Q. B. D. 102; *Rodgers vs. Niles*, 11 Ohio St. 48, 56; *Leopold vs. Van Kirk*, 27 Wis. 152). The tendency of recent decisions, however, has been strongly in the direction of extending the doctrines of implied warranty, and it was thought best in fixing the law in statutory form to follow exactly the English model." (Notes of Commissioners, 30 Am. Bar Assoc. Rep. pages 353-354).

"The provisions of the Sales Act are copied from the English statute and the English statute was intended to express the common law of England as it existed at the time the act was passed. It may, therefore, be supposed that the liability of a seller under the Sales Act will be somewhat greater than that imposed by the common law in many jurisdictions in this country." *Williston on Sales*, p. 335.

For further explanation of the changes made, see notes below.

English Act. This section is practically identical with section 14 of the Sale of Goods Act.

The following notes are believed to contain digests of all the important English cases decided under the Sale of

Goods Act upon this subject. They may be useful in the construction of the New York act.

Fitness for Purpose. Where a buyer notifies a seller that motors which he orders are required for the conveyance of passengers, the traffic to be carried on being heavy and the district hilly, and the machines furnished are unfit for the heavy work required of them, there is a breach of an implied warranty of fitness for a particular purpose. *Bristol Tramways Co. v. Fiat Motors*, [1910] 2 K. B. 831, 103 L. T. N. S. 443.

Where canned salmon is sold by grocers for use as food, there is an implied warranty that it is fit for human food, which is breached when the salmon is poisonous and causes the death of one who eats it. *Jackson v. Watson*, [1909] 2 K. B. 193, 100 L. T. N. S. 799.

A dealer in milk supplied a householder with milk for family use, and in an account book used in their dealings stated that elaborate precautions were taken to insure the purity of the milk. Held, that there was an implied warranty that the milk was reasonably fit for consumption as human food under sub-section 1 of section 14, and that the warranty was breached when a member of the family contracted typhoid fever from drinking the milk and died thereof. *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608, 92 L. T. N. S. 527.

A draper went to the shop of a druggist who sold hot-water bottles regularly, and asked for a hot-water bottle. The druggist stated that one shown would stand hot but not boiling water, and the draper bought the bottle. Held, there was an implied warranty of fitness for purpose which was breached by the breaking of the bottle in ordinary use and the scalding of the user. The court said (89 L. T. N. S. 33, 35): "I think that when people go into a shop in which these articles are dealt with, they are entitled to expect that

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some skill or judgment has been exercised by the shopkeeper in selecting the goods, so that when you buy something which the shopkeeper professes to sell you may expect to get a thing which is of some use for the purpose for which it is sold and is not mere rubbish. To that extent it seems to me that when the plaintiff asked at the druggist's shop for a bottle for use as a hot-water bottle he did it in such a way as to show that he relied upon the seller's skill and judgment." *Preist v. Last*, [1903] 2 K. B. 148, 89 L. T. N. S. 33.

A rule brought to the notice of a buyer that "no warranties are given with the goods sold by the society except on the written authority of one of the managing directors or the assistant manager," does not prevent the implied warranty of fitness for purpose from arising. Such a rule applies only to express warranties, not to those presumed by law as a part of the contract. *Clarke v. Army Co-operative Soc.*, [1903] 1 K. B. 155, 88 L. T. N. S. 1.

Where a buyer states that she wants "two nice, fresh crabs . . . for her tea," and the seller, a fishmonger, states that those he has are fresh, and the buyer takes two which are poisonous and cause illness to those who eat them, there is a breach of an implied warranty of fitness for purpose, namely, fitness for consumption as human food, and the buyer may recover damages. *Wallis v. Russell*, [1902] 2 Ir. R. 585.

A buyer of coal showed to the seller a letter from the buyer's principal stating that the coal was to be used for bunkering steamers and ships of war, and the seller thereafter agreed to deliver coal to fill the contract. Held, that there was an implied obligation to furnish coal fit for the purposes named, even though the contract was reduced to writing and contained no mention of the purpose. *Gillespie v. Cheney*, [1896] 2 Q. B. 59.

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Where the owner of a quarry has for some years supplied an iron smelting works with limestone, and knows the use to which the stone is put, namely, uses connected with smelting, a contract to furnish the smelting works with limestone implies an obligation to furnish stone reasonably fit for the purpose of smelting. *Strongitharm v. North Lonsdale Iron Co.*, 21 Times L. Rep. 357.

A seller showed a buyer a condenser-tube for steamers, stated that tubes of that kind were in use on certain Clyde tug-steamers, and later sent the buyer a corporate report in which the tubes were referred to as "giving good results in the Clyde tug-steamers." The buyer later ordered 750 of "your special condenser-tubes" for his steamer. Held, that there was an implied warranty of the quality of the tubes which was breached when, after four months' use, they were found to be worthless from corrosion. One of the judges considered the warranty one of merchantability, while two thought it one of fitness for purpose. *Williamson v. Macpherson*, Sc. Ct. Sess. 6 F. 863.

Merchantability. Merchantable quality is "used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would, after a full examination, accept it under the circumstances of the case in performance of his offer to buy that article, and whether he buys for his own use or to sell again so as to make the term 'salable' apply." *Bristol Tramways Co. v. Fiat Motors*, [1910] 2 K. B. 831, 103 L. T. N. S. 443, 446.

On a contract to sell motor horns where the vendor is the manufacturer, there is an implied warranty of their merchantability, which is breached when some of the horns are injured due to defective packing, others are defective due to careless workmanship, and some require polishing and other work to make them merchantable. The goods were bought

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by description, being made to order. *Jackson v. Rotax Motor Co.*, [1910] 2 K. B. 937, 103 L. T. N. S. 411.

Where a customer of a beer-house is accustomed to frequent that house to obtain Holden's beer because he knows that only that beer is sold there, and he orders Holden's beer, there is a sale of goods by description, and an implied warranty that the goods are merchantable, so that the buyer may recover for breach of warranty when the beer proves to contain arsenic and to be detrimental to his health. The jury expressly found that there was no reliance on the seller's skill or judgment, so that there could be no warranty of fitness for purpose. *Wren v. Holt*, [1903] 1 K. B. 610, 88 L. T. N. S. 282.

Patent or Other Trade Name. Where coal is sold for bunkering steamers and ships of war under the name of Cyfartha Merthyr and Hills Plymouth coal, there is not a sale of goods under a patent or other trade name so as to exclude an implied warranty of fitness for purpose. Referring to that exception the court says in this case: "That obviously is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs, or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise." *Gillespie v. Cheney*, [1896] 2 Q. B. 59, 64.

A contract for the sale of a 24 to 40 h. p. Fiat motor omnibus and six 24 to 40 h. p. Fiat motor omnibus chassis, the name Fiat being the name applied to that make of motors, is not a contract for the purchase of an article under a patent or other trade name. The court said: "In this case there was nothing that could properly be called a Fiat omnibus or a Fiat chassis; the industry was in the tentative stage, and the order was really for the par-

ticular omnibus and the chassis to be completed and made respectively by the Fiat Company on such lines and patterns as that company should find expedient for the purpose." *Bristol Tramways Co. v. Fiat Motors*, [1910] 2 K. B. 831, 103 L. T. N. S. 443, 445.

Where a seller sends to the buyer a circular advertising an apparatus known in trade as "Patterson's Smoke-Prevention Suction Draught for Land and Marine Boilers," and used to increase boiler capacity and to reduce or prevent smoke, in which circular the statement is made that "The smoke-prevention is absolute, and is attained by a proper arrangement," etc., there is a sale of an article under a patent or other trade name and no warranty of fitness for purpose is implied. *Paul v. Glasgow Corp., Sc. Ct. Sess. 3 F. 119*.

¹ Caveat Emptor the General Rule. "The rule of common law, *caveat emptor*, and not the rule of civil law, *caveat venditor*, applies to all sales of personal property in the State of New York, whether executed or executory. But to this rule, as to all rules of law, there are certain well-grounded exceptions recognized by our courts." *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166. The Sales Act purports to state all the exceptions to this general rule, in sections 94 to 97 inclusive.

Contract Written: Implied Warranty.

The fact that a contract is reduced to writing does not prevent the raising of an implied warranty. *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422. The statement on a seller's invoice that he does not warrant goods, when not brought to the buyer's attention, does not prevent the raising of an implied warranty. *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388.

² Fitness for Particular Purpose. *Manufacturers Distinguished from Other Sellers.* The common law of New York made a sharp distinction between the liability of sellers who were growers or manufacturers of the goods and sellers who did not occupy either of those relations to the goods. The former class of sellers were held liable upon a certain warranty of fitness for purpose, while the latter were not, even though they had knowledge of the particular purpose which the buyer had in mind. Thus in *Bartlett v.*

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Hoppock, 34 N. Y. 118, 88 Am. Dec. 428, hogs were sold by a broker with knowledge that the buyer wanted them for the New York market. The court held there was no implied warranty of their fitness for that purpose, stating the rule to be as follows: "All the preceding questions which we have noticed, and the exceptions thereto, seem to be based upon the theory, that a warranty of fitness of an article for a specific purpose, may be implied, from the knowledge on the part of the seller, that the article is intended for such specific purpose. This is a doctrine of the civil law, which has been attempted, but unsuccessfully, to be made a part of our common law. The authorities we have already cited, clearly hold, that where the vendor of the article is not the manufacturer of the article sold, and in cases where the vendee, as in this case, has equal knowledge and equal opportunities of knowledge of the character or quality of the article sold, with the vendor, the vendor is only liable upon an express warranty." *No Warranty of Fitness in Ordinary Sale; Illustrative Cases.*

This doctrine that a seller who has no reason to have superior knowledge concerning the article he sells because he has manufactured or grown it is under no obligation that it shall be fit for a particular purpose, is set forth and applied in the following cases: Reynolds v. Mayor, 39 App. Div. 218, 57 N. Y. S. 106 (sale of water closet tanks by dealer); Cafre v. Lockwood, 22 App. Div. 11, 47 N. Y. S. 916 (sale of twine by dealer); American Forcite Powder Mfg. Co. v. Brady, 4 App. Div. 95, 38 N. Y. S. 545 (powder sold by dealer with knowledge that it was wanted for blasting purposes); Healy v. Brandon, 66 Hun (N. Y.) 515, 21 N. Y. S. 390, affirmed 142 N. Y. 681, 37 N. E. 825 (sale of Panama hides by dealer); Whitman v. Jacobson, 119 N. Y. S. 246 (sale of cloth by dealer); Strauss v. Salzer, 58 Misc. 573, 109 N. Y. S. 734 (cloth sold by importer); Pascal v. Goldstein, 51 Misc. 629, 100 N. Y. S. 1025; Merriman Paper Co. v. New York Market Gardeners' Assoc., 58 Misc. 236, 108 N. Y. S. 1038.

Manufacturers' Rule Stated.

The rule regarding the liability of manufacturers is set forth in the following words in the leading case of Hoe v. Sanborn, 21 N. Y. 552, 556, 78 Am. Dec. 163: "The vendor is liable, in such cases [that is, where he is a manufacturer], for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he, knowingly, uses improper materials, he is liable for that also; but not for any latent defect in the material which he is not shown and cannot be presumed to have known." This rule made him liable for faulty workmanship or the selection of improper materials if he knew they were improper or ought to have known it; but it did not render him liable for latent defects in materials purchased from others which he could not reasonably be expected to discover.

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Rule Changed by Sales Act.

As suggested in the foregoing portions of this note, the Sales Act has, by the insertion in sub-sections 1 and 2 of the words "whether he be the grower or manufacturer or not," destroyed the distinction formerly prevailing between such sellers and ordinary dealers, and it has also extended the warranty of fitness for purpose to all defects, whether arising from negligence or not. These are two noteworthy changes in the New York law of warranty.

Theory of Old Rule.

The theory behind this manufacturer's warranty at common law was stated as follows in *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166: "The rule that implies the warranty by the manufacturer against secret defects, which obtain in the process of the manufacture itself, rests upon and has for its foundation the presumption that the manufacturer either knew of the care that is used in the manufacture of the article, or was bound to know what degree of care was used in such manufacture."

Manufacturers' Rule Illustrated.

The doctrine of *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, regarding the manufacturer's liability, has been applied in the following cases: *Heath Dry Gas Co. v. Hurd*, 193 N. Y. 255, 86 N. E. 18 (carbureters); *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856 (felt cloth); *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422 (petroleum); *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515 (iron castings); *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 136 App. Div. 22, 120 N. Y. S. 163 (paving blocks); *Durbrow Mfg. Co. v. Cuming*, 35 App. Div. 376, 54 N. Y. S. 818 (sewing machines); *Gutwillig v. Zuberbier*, 41 Hun (N. Y.) 361, 32 N. Y. St. Rep. 605 (liquor); *Gautier v. Douglass Mfg. Co.*, 13 Hun (N. Y.) 514 (steel); *Rogers v. Beckrich*, 46 App. Div. 429, 61 N. Y. S. 725 (bicycle parts); *Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. S. 1048 (window screens); *Baylis v. Weihezahl*, 42 Misc. 178, 85 N. Y. S. 355 (pliers); *League Cycle Co. v. Abrahams*, 27 Misc. 548, 58 N. Y. S. 306 (bicycle parts); *Metz v. Virgil Practice Clavier Co.*, 26 Misc. 726, 56 N. Y. S. 1081 (ornamental figures); *Stackfleth v. Demuth Glass Mfg. Co.*, 25 Misc. 482, 54 N. Y. S. 989 (melting pots).

That the manufacturer's liability does not extend to latent defects in materials bought from others, see *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166.

Growers of Crops.

At common law the same rule was applied to a grower as to a manufacturer. Thus in *White v. Miller*, 71 N. Y. 118, 27 Am. Rep.

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13, it was held that upon the sale by a grower of "large Bristol cabbage seed," there was an implied warranty that the seed was free from any latent defect arising from improper cultivation. The following cases also sustain this point: *Prentice v. Fargo*, 53 App. Div. 608, 65 N. Y. S. 1114, affirmed 173 N. Y. 593, 65 N. E. 1121 (seed wheat); *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388 (seed peas impure from cross fertilization).

Elements of Statutory and Common Law Warranties Similar.

Apparently the two requisites named in sub-section 1, namely, notice of particular purpose and reliance on the seller's skill or judgment, were also necessary at common law. Thus in *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 570, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166, the court stated that the warranty is that "the article sold shall be fit for the purpose for which it is sold *if the particular purpose be specified*, and that it shall be free from any internal defect which renders it unfit for the purpose specified." As sustaining this view, see also *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Hargous v. Stone*, 5 N. Y. 73; *Hart v. Wright*, 17 Wend. (N. Y.) 267. And in *Wood Mower Co. v. Thayer*, 50 Hun (N. Y.) 516, 521, 3 N. Y. S. 465, the court defined the manufacturer's obligation regarding the article sold to be "that it is free from any latent defects growing out of the process of manufacture, and known to him, and that it is reasonably fit for the purpose for which it is intended, *unless the purchaser relies upon his own judgment*." See also *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

Provisions.

At common law there was a rule that, upon the sale of provisions for immediate human consumption, there was implied a warranty that they were wholesome and fit for use as food. This rule is illustrated in the following cases: *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339 (sale of beef; but here there was fraud); *Divine v. McCormick*, 50 Barb. (N. Y.) 116 (sale of heifer); *Davis Provision Co. v. Fowler*, 20 App. Div. 626, 117 N. Y. S. 205, affirmed 163 N. Y. 580, 57 N. E. 1108; *Money v. Fisher*, 92 Hun (N. Y.) 347, 36 N. Y. S. 862; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372.

But the rule had no application to cases where the buyer was not to be the consumer, but merely to use the provisions for resale. *Moses v. Mead*, 1 Den. (N. Y.) 378, 43 Am. Dec. 676 (sale of meat by wholesaler to retailer); *Wart v. Hoose*, 65 Misc. 462, 119 N. Y. S. 1107 (sale of cow to butcher); *Cotton v. Reed*, 25 Misc. 380, 54 N. Y. S. 143 (sale of cow to butcher). In *Julian v. Laubenberger*, 16 Misc. 646, 38 N. Y. S. 1052, it was held that the rule did not apply to the sale of a can of salmon by a retailer to a consumer, the re-

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tailer not having prepared the food, and having no knowledge of its condition.

Effect of Act on Provisions Rule.

It is believed that this special rule regarding provisions has been abolished by the Sales Act because of the failure of section 96 to make mention of it and because the section purports to exclude all warranties not mentioned. The effect of such an abolition of the special common law rule, however, would be merely to throw sales of provisions under the same rule as sales of all other goods, namely, under the rule of sub-section 1 of section 96. If the buyer of provisions stated the purpose for which he bought them, which he would impliedly do in practically all cases, and relied on the skill or judgment of the seller of the provisions, there would be an implied warranty of fitness for the particular purpose, which would ordinarily be consumption as food.

This seems to be the view of Professor Williston. See note on page 325 of Williston on Sales as follows: "In *Bigge v. Parkinson*, 7 H. & N. 955, it was held that the rule in regard to provisions was like the rule as to other goods. So in the English Sale of Goods Act there is no separate rule established for provisions, and under the general rule of section 14 (1) reliance upon the seller's skill or judgment is essential. This provision has been copied in the American Sales Act, section 15 (1)."

The English cases decided under the Sale of Goods Act have several times construed the act with reference to sales of provisions and have implied warranties of fitness for use as food under sub-section 1. See notes to English cases under this section, ante.

In *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 579, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166, the Appellate Division in the Fourth Department refers to the English act and the case of *Wren v. Holt*, [1903] 1 K. B. 610, a case involving the sale of beer containing arsenic, and seems to think that the rule regarding the sale of provisions would not be affected by the Sales Act because of the rule stated in the section corresponding to section 154 of the New York act, namely, that the rules of the common law govern all cases not provided for by the act. It is submitted, however, that this view is erroneous, since section 96 expressly excludes all implied warranties of quality not mentioned therein.

Draftsman's Note.

Regarding this sub-section Professor Williston says (Williston on Sales, p. 336): "In regard to sub-section (1) some difficulty of construction has been felt. This is the only subsection under which a warranty of a specific chattel can be implied and the question has been raised—do the words of this subsection justify the implication of a

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warranty of merchantability, or must the words "particular purpose" be held to indicate that the section is not aimed at general merchantability but only at more specific purposes? It would be unfortunate if the section should be narrowly construed, and had it not already received a liberal construction in England, a construction which it may be assumed American courts would follow, it would be undesirable to copy the English legislation in this matter. The last edition of Benjamin on Sales thus summarizes the results of the English decisions: "A 'particular purpose' is not some purpose necessarily distinct from a general purpose; for example, the general purpose for which all food is bought is to be eaten, and this would also be the particular purpose in any specific instance. A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods; and it may appear from the very description of the article, as, for example, 'coatings,' or a 'hot-water bottle.' But where an article is capable of being applied to a variety of purposes the buyer must particularize the specific purpose he has in view."

3 Merchantable Quality. *Definition.* "Merchantable" has been variously defined. Thus in *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 351, 35 Am. Dec. 572, it is stated that the word means "at least of medium quality or goodness." In *Drummond v. Van Ingen*, 12 App. Cas. 284, the English court states that it considers an article unmerchantable if it "be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used." Professor Williston states (p. 327, Williston on Sales) that merchantable goods are "goods salable as goods of the general kind which they were described or supposed to be when bought."

Fitness and Merchantability Sometimes Equivalent.

If the "particular purpose" which the buyer has in mind when he buys goods is merely their normal use, fitness for purpose will be equivalent to merchantability. It is obvious, however, that the "particular purpose" may be either broader or narrower than mere merchantability. Because of the possible equivalence of these two warranties, the connection between sub-section 1 and sub-section 2 is very close. See the English cases construing the Sale of Goods Act on this subject, ante.

Common Law Warranty of Merchantability.

The New York courts appear to have implied a warranty of merchantable quality when the contract of sale was an executory contract. "In an executory contract for the sale of personal property, the law implies that the article, when furnished, shall be of merchantable quality (*Hargous v. Stone*, 5 N. Y. 73 and cases cited)." *Reed v. Randall*, 29 N. Y. 358, 362, 86 Am. Dec. 305. The warranty appears to have been dealt with principally in dicta. Traces of its

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existence are found in the following cases: *Hargous v. Stone*, 5 N. Y. 73, 86; *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166; *Plumb v. Hallauer Co.*, 145 App. Div. 20, 25, 130 N. Y. S. 147; *Wood Mower Co. v. Thayer*, 50 Hun 516, 521, 3 N. Y. S. 465; *P. J. Sorg Co. v. Crouse*, 88 Hun 246, 248, 34 N. Y. S. 741; *Tichnor v. Barley*, 72 Misc. 638, 639, 132 N. Y. S. 243; *Hart v. Wright*, 17 Wend. (N. Y.) 267, 277, affirmed 18 Wend. (N. Y.) 449; *Sprague v. Blake*, 20 Wend. (N. Y.) 61, 64; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 351, 35 Am. Dec. 572; *Ferguson v. Netter*, 204 N. Y. 505.

Probable Effect of Act.

It seems probable that the warranty of merchantability referred to in these cases is substantially that perpetuated in the Sales Act (section 96, sub-section 2). The common law requirement that the contract be executory is substantially the equivalent of the statutory requirement that the sale be one by description, since practically all sales by description are executory. In the rare but conceivable cases where specific goods are sold by description, the Sales Act would seem to add to the seller's liability in New York. On the other hand, the common law does not appear to have restricted this liability for merchantability to "a seller who deals in goods of that description," so that the Sales Act has apparently made a slight restriction in this respect.

Caveat Emptor.

The strict common law rule of *caveat emptor*, with no exceptions, now long since abandoned, is illustrated in *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440.

Present Sale of Specific Chattel.

At common law, upon the present sale of a specific chattel, there was no implied warranty of quality. *Hargous v. Stone*, 5 N. Y. 73, 86; *Jackson v. Helmer*, 73 App. Div. 135, 77 N. Y. S. 835; *Flood v. Senger*, 140 App. Div. 140, 124 N. Y. S. 1013; *Hart v. Wright*, 17 Wend. (N. Y.) 267, 277, affirmed 18 Wend. 449; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; *Paul v. Hadley*, 23 Barb. (N. Y.) 521. It would seem that this rule must under the Sales Act, be qualified by subsections 1 and 2 of this section. There may be an implied warranty of fitness for purpose in any present sale and an implied warranty of merchantability in a present sale by description.

Fitness for Transportation.

The warranty of merchantability included at common law the element of merchantability as an article of commerce, that is, fitness for transportation. *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260.
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268, 23 N. E. 372; Carleton v. Lombard, 149 N. Y. 137, 150, 43 N. E. 422.

***Effect of Examination.** *Actual Inspection and Opportunity for Inspection.* This sub-section seems to make a change in the law. Under it there must be actual inspection by the buyer in order to do away with warranties otherwise implied concerning defects possible of discovery. Apparently by refusing to inspect the buyer can relieve himself. But at common law either actual inspection or opportunity for inspection prevented the existence of a warranty as to patent defects. Hight v. Bacon, 126 Mass. 10, 30 Am. Rep. 639; Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207; McCormick v. Sarson, 45 N. Y. 265, 6 Am. Rep. 80; Gurney v. Atlantic R. Co., 58 N. Y. 358; Norton v. Dreyfuss, 106 N. Y. 90, 94, 12 N. E. 428; Studer v. Bleistein, 115 N. Y. 316, 325, 22 N. E. 243; Zabriskie v. Central Vermont R. Co., 131 N. Y. 72, 78, 29 N. E. 1006; Waeber v. Talbot, 167 N. Y. 48, 57, 60 N. E. 288; Salisbury v. Stainer, 19 Wend. (N. Y.) 159, 161, 32 Am. Dec. 437; Merriam v. Field, 39 Wis. 578.

Draftsman's Note.

Concerning this sub-section Professor Williston says (Williston on Sales, p. 335): "Sub-section (3) expresses the better view in regard to inspection. As to defects which inspection ought to reveal, the inspection prevents any implied warranty as to such defects, but otherwise inspection is unimportant. In one respect, however, this sub-section changes the law. The sub-section refers only to examination and says nothing of opportunity to examine. The fact that the buyer has an opportunity to examine will as such be unimportant under the act. It will, however, be important evidence upon the general question raised in sub-section (1), whether the buyer relies on the seller's skill or judgment. Instead of making a right to inspect conclusive either as to obvious defects or as to latent defects and instead of making actual inspection as to latent defects conclude the buyer the act reverts to the general principle which gives inspection, or a right of inspection, its importance; namely, the reliance on the seller's skill instead of on the buyer's own judgment."

⁵Patent or Other Trade Name. The principle set forth in this sub-section is believed to be a statement of a rule of the common law. "The plaintiff owned the foundry referred to. He manufactured there iron known as No. 1, and iron known as No. 2. This fact was known to the defendants. They contracted with the plaintiff for 800 tons, not of No. 1 and No. 2 iron generally, but for iron known as Nos. 1 and 2 of the Poughkeepsie furnace. Whether it was good or poor, hard or soft, would make good stove castings or poor ones, was not

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at all in question. Whether it was as good as the iron made at other factories, whether it was above or below the average, was not important. It was as if they had contracted with a farmer for 800 bushels of the yellow corn to be raised on his farm in a certain town, or 800 bushels of the winter wheat to be raised on a particular lot, or the apples from the trees in his orchard. Such a contract assumes that the parties know what is the character of the article to be there produced. They select a particular standard, and do not rely, either upon its merchantable character or upon its productive quality. If the particular iron, corn, wheat or apples thus to be produced is furnished to the buyer, the contract is performed." *Beck v. Sheldon*, 48 N. Y. 365, 370.

See also *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 12 S. Ct. 46, 35 U. S. (L. ed.) 837; *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587; *American Home Sav. Bank Co. v. Guardian Trust Co.*, 210 Pa. St. 320, 59 Atl. 1108.

Nor is there a complete implied warranty where the buyer designs the article to be sold. The seller is freed from all responsibility for defects due to the method of design. *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. S. 163, affirmed 188 N. Y. 619, 81 N. E. 1166.

See notes on English cases, ante, pages 74-75, for definitions of what is a patent or other trade name.

6 Warranty by Usage. This sub-section is believed to be contrary to the pre-existing law in New York. Although the authorities are not numerous, it has been held that a warranty "cannot be established, by proof that it was a general custom or usage of persons dealing in the article, thus to contract." *Beirne v. Dord*, 5 N. Y. 95, 102, 103, 55 Am. Dec. 321; *Thompson v. Ashton*, 14 Johns. (N. Y.) 316.

Proctor v. Atlantic Fish Co., 208 Mass. 351, 94 N. E. 281, was an action brought after the enactment of the Sales Act in Massachusetts, in which recovery was sought for a breach of warranty on a sale of mackerel, and it was there held that the trial judge was justified in refusing to charge that "a warranty as to quality or condition of the mackerel cannot be implied into this case by evidence of custom or usage." Referring to *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656, a case in which it was held that a warranty could not be raised by usage, the court said (p. 355): "The rule adopted in that case never was law in many jurisdictions (see *Williston on Sales*, § 246) and has been changed in the sales act. St. 1908, c. 237, Part I, § 15 (5)."

But the authority of an agent to warrant may be proved by usage. *Reynolds v. Mayor*, 39 App. Div. 218, 57 N. Y. S. 106.

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⁷ Express Warranty Does Not Exclude Implied. This sub-section is considered out of accord with the common law in New York. "An express warranty with reference to quality precludes an implied warranty with reference thereto, even though it relate to a different quality." *Turl v. Williams Engineering, etc. Co.*, 136 App. Div. 710, 712, 121 N. Y. S. 478, citing *DeWitt v. Berry*, 134 U. S. 306, 10 S. Ct. 536, 33 U. S. (L. ed.) 896; *Baldwin v. Van Deusen*, 37 N. Y. 487, and *Carleton v. Lombard*, 72 Hun 254, 260, 25 N. Y. S. 570, reversed on another point, 149 N. Y. 137, 43 N. E. 422. See also to the same effect, *Charter Gas Engine Co. v. Kellam*, 79 App. Div. 231, 234, 79 N. Y. S. 1019. But see *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. S. 34.

An allegation that articles purchased were warranted to be fit and proper for the purpose for which they were designed is supported by proof of either an implied or an express warranty. *Reynolds v. Mayor*, 39 App. Div. 218, 57 N. Y. S. 106; *Rogers v. Beckrich*, 46 App. Div. 429, 61 N. Y. S. 725.

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§ 97. IMPLIED WARRANTIES IN SALE BY SAMPLE. In the case of a contract to sell or a sale by sample: ¹

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.²

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in subdivision three of section one hundred and twenty-eight.³

(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.⁴

Effect of Section. This section declares the common law except (1) that the warranty here discussed is called an "implied" warranty under the Sales Act, whereas it was known as an "express" warranty at common law, and (2) that the liability set forth in sub-section 3 of the section seems not to have been recognized by the New York courts. The first change mentioned is not of practical importance, since the Sales Act gives the buyer remedies for the breach of an implied warranty as broad as those allowed the buyer for breach of an express warranty at common law. See sections 130 and 150, post.

English Act. Section 15 of the Sale of Goods Act is the practical equivalent of this section, except that the last clause of sub-section (b) and the first clause of sub-section (c) of the American act are not found in the English act.

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In *Polenghi v. Dried Milk Co.*, 92 L. T. N. S. 64, it was held that where goods are sold to be shipped by the seller to the buyer and "Payment is to be made * * * in London on the arrival of the powders against shipping or railway documents," the buyer is not entitled to inspect the goods to see whether they correspond with the sample, before payment. If the goods proved inferior to the sample as ascertained by later use, the court held that they might be returned, and the option of so returning them would not be removed by payment.

¹ **What Is a Sale by Sample?** This question has been a more difficult one to answer than the question concerning the effect of such a sale.

Intent Necessary?

An important distinction has existed in New York between the mere exhibition of a sample with a representation, express or implied, that the sample thus exhibited had been taken fairly from the bulk, and an agreement between the parties that a sample shown should be considered as a representative portion of the entire bulk. The former transaction has not been regarded as a sale by sample in this state, although it has in some other states. See *Bradford v. Manly*, 13 Mass. 139, 143, 7 Am. Dec. 122.

"The seller need not state that the bulk of the goods corresponds with the sample, as the warranty is 'implied in fact,' and is express, for it must be found as a fact that the parties intended the sale to be made by sample, and that the exhibition of the sample was regarded by them as in effect an affirmation as to the quality of the articles sold. * * * The mere exhibition of a sample is not of itself an agreement to sell by sample, and it is usually a question of fact for the jury to decide whether, under all the circumstances, the parties intended that the sale should be made in that way." *Henry v. Talcott*, 175 N. Y. 385, 389, 390, 67 N. E. 617.

For other cases laying down the rule that intent to warrant by sample is necessary and that the mere act of exhibition of the sample is insufficient to give rise to a warranty, see *Hargous v. Stone*, 5 N. Y. 73; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Jacobs v. Day*, 5 Misc. 410, 25 N. Y. S. 763; *E. T. Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc.

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539, 97 N. Y. S. 1048; *Pascal v. Goldstein*, 51 Misc. 629, 100 N. Y. S. 1025.

Obviously where the buyer has procured a sample of the goods without the seller's knowledge, and then contracts to buy the goods relying on this sample, there is no warranty that the bulk is equal to the sample. *Ames v. Jones*, 77 N. Y. 614.

Since the Sales Act makes no attempt to define a sale by sample, it would seem that the requirement of the New York courts that intent should exist is not affected by the act. The doctrine is somewhat peculiar, since intent to warrant is not necessary in the case of the ordinary express warranty, a warranty by words (see sec. 93 and notes, ante). Why then should intent be necessary where the express warranty is by acts, which have the same effect as words?

Must the Goods be in Existence?

It has been held in New York that a sale by sample can only exist where the goods are *in esse* at the time of the making of the contract. *Gurney v. Atlantic R. Co.*, 58 N. Y. 358, 364; *Brigg v. Hilton*, 99 N. Y. 517. But there is good authority for the contrary view. "The rule is the same whether the goods are in existence at the time of the contract of sale or are to be manufactured, although it is sometimes said that such a sale is not technically one by sample." *Henry v. Talcott*, 175 N. Y. 385, 390, 67 N. E. 617. See, also, *Hardt v. Western Electric Co.*, 84 App. Div. 249, 82 N. Y. S. 835.

The law upon this subject would seem to be unaffected by the Sales Act since that statute makes no attempt to define the elements of a sale by sample.

Illustrative Cases.

A contract to manufacture and deliver wrenches to be made in a first class manner, in every way equal to a model, is not a sale by sample. *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 App. Div. 187, 87 N. Y. S. 41, affirmed 181 N. Y. 573, 74 N. E. 1118. And a contract to manufacture goods according to orders and specifications, even though the buyer selected a type or style of goods from various grades shown him, is not a sale by sample. *Smith v. Coe*, 170 N. Y. 162, 63 N. E. 57. But where Powelton coal of the "same quality and kind as furnished" by the seller to the buyer during the preceding year, is sold, there is a sale by sample. "A contract of sale which points out a known and ascertainable standard by which to judge the quality of goods sold, is, for all practical purposes, a sale by sample, and renders the vendor liable for damages upon a breach of warranty, although there has been an acceptance after opportunity to

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inspect the goods." *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. 1006.

Examination.

"The chief reason for exempting sales by sample from the cardinal rule of *caveat emptor* is that the buyer has no chance to protect himself by an examination of the commodity sold. When the goods are in the presence of the parties at the time of the sale and an adequate examination can be made, even if it is inconvenient or difficult, according to the weight of authority the sale is not to be regarded as made by sample in the absence of an express agreement to that effect." *Henry v. Talcott*, 175 N. Y. 385, 390, 391, 67 N. E. 617. See also *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437; *Hargous v. Stone*, 5 N. Y. 73.

Time of Exhibition of Sample.

A sale by sample may take place although the sample was delivered some months before the actual sale and was in the possession of the buyer, not the seller. *Kupfer v. Pellman*, 67 Misc. 149, 121 N. Y. S. 1081.

²Correspondence of Bulk With Sample. *Terminology.* The obligation described in sub-section (a) existed at common law in this state, but was known as an "express" warranty. *Staiger v. Soht*, 116 App. Div. 874, 102 N. Y. S. 342, affirmed 191 N. Y. 527, 84 N. E. 1120; *Larowe Milling Co. v. Lyons Beet Sugar Refining Co.*, 137 App. Div. 732, 122 N. Y. S. 567; *Waring v. Mason*, 18 Wend. (N. Y.) 425, and cases cited in note 1 above. Express warranties survived acceptance at common law in this state, while implied warranties did not. See cases cited under section 130, post. But although the name applied to the warranty on a sale by sample has been changed from "express" to "implied," the remedy open to a buyer on breach of an implied warranty and the effect of acceptance under an implied warranty have also been changed so that an implied warranty survives acceptance. See notes to sections 130 and 150, post. Therefore, this change in nomenclature apparently has no practical effect.

Where goods consist of several varieties and qualities of the same article, and the sample is made by mixing proportionate parts of the different varieties and qualities, the warranty is that the whole quantity, if mingled together, would be of a quality equal to that of the sample. *Leonard v. Fowler*, 44 N. Y. 289.

³Right to Inspection. *Draftsman's Note.* Regarding this sub-section Professor Williston says (*Williston on Sales*, p. 349): "It is a general principle of the law of sales that unless the terms of the contract necessarily imply the contrary, the buyer shall not be obliged to

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pay the price unless and until he has had an opportunity to inspect the goods. The effect of the provision in regard to inspection in section 16 of the Sales Act [N. Y. P. P. L., sec. 97] is that the mere fact that a contract to sell or a sale is made by sample does not exclude the operation of the general rule, and that, therefore, the buyer need not take the goods or pay the price until he had a chance to see them, and the seller is bound to give him a chance."

The sub-section is also said by Professor Williston to be based on the English case of *Lorymer v. Smith*, 1 B. & C. 1, 8 E. C. L. 1. (Williston on Sales, p. 349, note).

For cases illustrating the right of inspection attaching to all contracts of sale, including those by sample, see *Croninger v. Crocker*, 62 N. Y. 151; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831.

Subdivision 3 of section 128 referred to in this sub-section provides that the buyer under a C. O. D. contract is not entitled to inspect the goods until he has paid the price. For a general discussion of the New York cases on inspection, see notes to section 128, post.

4 Merchantability. *Common Law View.* It seems doubtful whether this statement of the law is in accord with the pre-existing law in New York. Thus in *Henry v. Talcott*, 175 N. Y. 385, 389, 67 N. E. 617, the court discusses the warranty arising on a sale by sample and states: "In the absence of fraud the warranty does not cover latent defects, unless the seller is the manufacturer, when it may extend to latent defects growing out of the process of manufacture." And in *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374, the sale was by sample and it was held that there was no warranty of quality except that the wheat should correspond with the sample. Kent, Ch. J., said (p. 410): "The cargo corresponded with the sample in quality of grain, and that was all that was intended by the exhibition of the sample." See also *DeWitt v. Berry*, 134 U. S. 306, 10 S. Ct. 536, 33 U. S. (L. ed.) 896; Benj. on Sales, 7th ed., page 684.

Draftsman's Note.

Professor Williston says of this sub-section (Williston on Sales, p. 350): "As should be the case, however, where the buyer inspects or has an opportunity to inspect the bulk, but the defect in the goods is of such a character that inspection will not reveal it, so in the case of a sale by sample, if the sample is subject to a latent defect, and the buyer reasonably relies on the seller's skill or judgment, the buyer is entitled not simply to goods like the sample, but to goods like those which the sample seems to represent, that is merchantable goods of that kind and character. As has already been said, it was thought

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in drawing the Sales Act that this wider obligation should be restricted to the case of dealers in goods of the kind in question, but as to dealers of that character, the provision is clearly sound."

In discussing this situation the Supreme Court of Pennsylvania in *Boyd v. Wilson*, 83 Pa. St. 319, 324, 24 Am. Rep. 176, says: "The sample under such circumstances, pure and simple, becomes a guaranty only that the articles to be delivered shall follow its kind, and be simply merchantable." This case is followed in *Selser v. Roberts*, 165 Pa. St. 242, 246.

PART II.

TRANSFER OF PROPERTY AND TITLE.

CHAPTER VII.

TRANSFER OF PROPERTY AS BETWEEN BUYER AND SELLER.

§ 98. **NO PROPERTY PASSES UNTIL GOODS ARE ASCERTAINED.** Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section eighty-seven.¹

Effect of Section. This section is declaratory of the common law.

English Act. Section 16 of the Sale of Goods Act is the equivalent of this section, except that it does not contain the last clause found in the American section. The doctrine of the section referred to in this last clause (N. Y. P. P. L., sec. 87) is not recognized in England.

¹**Goods Must Be Identified.** The law stated in the section is elementary. Obviously parties cannot transfer the property in goods which are not known and identified. "It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained." *Kimberly v. Patchin*, 19 N. Y. 330, 332, 75 Am. Dec. 334. For cases to the same effect, see *Crofoot v. Bennett*, 2 N. Y. 258; *Gardiner v. Suydam*, 7 N. Y. 357; *Cornell v. Clark*, 104 N. Y. 451, 457, 10 N. E. 888; *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292; *Lighthouse v.*

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Buffalo Third Nat. Bank, 162 N. Y. 336, 56 N. E. 738; Rapelye v. Mackie, 6 Cow. (N. Y.) 250; Comfort v. Kiersted, 26 Barb. (N. Y.) 472.

The exception which *may* exist in the case of the sale of an undivided share of ascertained goods has been explained under section 87, ante.

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§ 99. PROPERTY IN SPECIFIC GOODS PASSES WHEN PARTIES SO INTEND.

1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.¹

2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.²

Effect of Section. This section is obviously declaratory of elementary law.

English Act. The American section follows closely section 17 of the Sale of Goods Act.

¹ **Intent the Controlling Factor.** In discussing the passing of the property in goods, the court in *Terry v. Wheeler*, 25 N. Y. 520, 525, said: "The questions which arise in such cases, as to sales, are questions of intention, such as arise in all other cases of the interpretation of contracts; and when the facts are ascertained, either by the written agreement of the parties or by the findings of a court, as they are here, they are questions of law." See also, *Burt v. Dutcher*, 34 N. Y. 493, 496. Where the parties expressly provide for the vesting of the property in parts of the goods at different stages of the contract, the courts will follow their expressed intent. *Hurd v. Cook*, 75 N. Y. 454. The use of the word "sell" is not conclusive as indicating an intent to make a present sale. *Decker v. Furniss*, 14 N. Y. 611.

² **Method of Ascertaining Intent.** "It is competent for parties to an executory contract for the sale of personal property, to provide in their agreement where and on what event the title shall vest in the vendee. If there is no express agreement on the subject, the question is to be solved by considering all the terms of the contract in connection with the acts of the parties, and applying thereto the rules

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of law applicable to the case." *Cornell v. Clark*, 104 N. Y. 451, 455, 10 N. E. 888. "The intention of the parties, in agreements of this nature, is to be collected from the whole instrument; it is the intention, thus collected, that the court is bound to carry into effect, and in doing so, the literal import of particular words, when inconsistent with the intention, thus ascertained, may be, and, in numerous cases, has been disregarded. (3 Duer 309)." *Kelley v. Upton*, 5 Duer (N. Y.) 336, 340. As to the possible effect of custom on the passage of title, see *Groat v. Gile*, 51 N. Y. 431.

How the intent may be proved is obviously a question of evidence which needs no extended discussion here.

§ 100. RULES FOR ASCERTAINING INTENTION. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.¹

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.²

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.³

Rule 3. 1. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.⁴

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving no-

tice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.⁵

Rule 4. 1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.⁶

2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section one hundred and one. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.⁷

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.⁸

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Effect of Section. Section 100 is believed to express the common law of New York, except that the last sentence of Rule 4 reverses the rule regarding the effect of shipment in C.O.D. sales. See note 7 below.

English Act. The Sale of Goods Act, section 18, differs in some material respects from this section of the Sales Act. For a complete statement of the differences reference is made to the English act printed in the appendix, post. Roughly the distinctions are that the English act (1) inserts a rule that the necessity to weigh or measure to ascertain the price postpones the passing of the property; (2) makes no distinction between the sale or return contract and the sale on approval and applies the rules laid down for the latter in the American act to the former; (3) omits the last sentence of Rule 4, subdivision 2, of the American act; and (4) does not contain Rule 5 of the Sales Act.

The following English cases have been decided under the corresponding section of the English act: *Truman v. Attenborough*, 103 L. T. N. S. 218, holding that where goods are delivered on approval with a statement that "These goods remain the property of W. Truman, Limited until invoiced by them," the intention of the parties controls and title does not pass on delivery but does pass when the goods are invoiced to the buyer, even though such invoicing was procured by fraud; *Laing v. Barclay*, [1908] A. C. 35, 97 L. T. N. S. 816, in which case it was decided that, where a contract is made for the building of a ship, payments to be made in installments, the last payment six months after the delivery of the ship, it is apparent that the parties intended that the property should not pass until the vessel was completed, and such intent will be given effect; *Weiner v. Smith*, [1906] 2 K. B. 574, 95 L. T. N. S.

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438, holding that where goods are delivered under a contract containing the clause, "Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged," there is an expressed intent that title shall not pass until payment or credit given, and hence the person to whom the goods are delivered cannot give good title to an innocent purchaser prior to such payment or charging; *Reid v. Macbeth*, [1904] A. C. 223, 90 L. T. N. S. 422, holding that where a contract for the building of a ship provides that the materials, as the building proceeds, become the property of the buyer, and plates for use in the ship have been passed by Lloyd's surveyor and marked with the number of the ship and position in it, they are nevertheless the property of the seller, and on his bankruptcy pass to his trustee. The rule applies that they have not been appropriated "unless they have been affixed to, or in a reasonable sense made part of, the corpus."

In *Harland v. Burstall*, 84 L. T. N. S. 324, it was held that where the defendant agreed to ship to the plaintiff 500 loads of timber and actually shipped 470, the title to the timber did not pass to the buyer.

When a person to whom goods have been delivered on a "sale or return" contract pawns them, the property passes and the pawnee acquires good title against the person who delivered the goods on "sale or return." "The contract by which goods are delivered 'on sale or return' means this: the purchaser may return the goods within a reasonable time, and the option of return belongs solely to the purchaser; the other party cannot even ask for the return of the goods; the only right of the other party is to sue for the price if the goods are not returned." *Kirkham v. At-*

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tenborough, [1897] 1 Q. B. 201, 75 L. T. N. S. 543, 544. Where goods are delivered on "sale or return" with an understanding that the property should not pass except on payment of cash, a pledgee of the goods from the buyer before payment of the price by the buyers gets no title. *Edwards v. Vaughan*, 26 Times L. Rep. 349, affirmed 26 Times L. Rep. 545.

¹ Rules Merely Presumptive. The rules laid down under section 100 are merely rules of presumption, and if the parties manifest their intention clearly, even though it be contrary to the presumption ordinarily arising, the title will pass as the intention indicates. *Terry v. Wheeler*, 25 N. Y. 520; *Porter Mfg. Co. v. Edwards*, 29 Hun (N. Y.) 509.

² Unconditional Contract to Sell Specific Goods. "But it is the general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the goods sold delivered to the purchaser." *Bradley v. Wheeler*, 44 N. Y. 495, 502. Rule 1 states the unquestioned common law of this state. For similar holdings see *Joyce v. Adams*, 8 N. Y. 291, 296; *Terry v. Wheeler*, 25 N. Y. 520, 525; *Bissell v. Balcom*, 39 N. Y. 275; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 72, 35 N. E. 415; *Giordano v. Nizzari*, 115 N. Y. S. 719; *Lansing v. Turner*, 2 Johns. (N. Y.) 13; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93; *Olyphant v. Baker*, 5 Den. (N. Y.) 379.

Delivery.

"A sale of a specified chattel may pass the property therein to the vendee and vest the title in him without delivery." *Groat v. Gile*, 51 N. Y. 431, 437. Delivery is strong but not conclusive evidence of intent to pass title. *Cornell v. Clark*, 104 N. Y. 451; *Nash v. Weaver*, 23 Hun (N. Y.) 513. Delivery of a smaller quantity than that ordered does not pass title to the buyer. *Bruce v. Pearson*, 3 Johns. (N. Y.) 534. A delivery of the key of a warehouse in which goods are deposited is a sufficient delivery of the goods to transfer the property. *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364.

Inspection.

The fact that inspection is to be allowed and is not made has no effect on the passage of the title, where there is no evidence that the goods were not as ordered. *Gass v. Astoria Veneer Mills*, 121 App. Div. 182, 105 N. Y. S. 794.

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A contract for the sale of shares of stock, at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent per annum," effects a present sale of the stock, so that the seller becomes a quasi-trustee for the buyer and the buyer is entitled to dividends declared on the stock after the making of the contract. *Currie v. White*, 45 N. Y. 822.

Cash Sales.

A provision in a contract of sale at common law in this state that payment of the price should be made on delivery of the goods rendered the contract a conditional sale, and title did not pass until payment, unless the condition was waived. "It is too well settled to require the citation of authority, that where a sale of personal property is made upon condition that the stipulated price shall be paid upon delivery, title does not pass until payment made, unless the vendor waive the condition." *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40, 43, 21 N. E. 49. For similar holdings see *Smith v. Lynes*, 5 N. Y. 41; *Hammett v. Linneman*, 48 N. Y. 399; *Dows v. Kidder*, 84 N. Y. 121; *Schryer v. Fenton*, 15 App. Div. 158, 44 N. Y. S. 203; *Lange v. Fisch*, 9 Misc. 475, 30 N. Y. S. 220; *Scher v. Roher*, 34 Misc. 792, 69 N. Y. S. 929; *Daly v. Crawford*, 72 Misc. 272, 131 N. Y. S. 220. For expressions apparently contrary, see *Hayden v. Demets*, 53 N. Y. 426, 431; *Morey v. Medbury*, 10 Hun (N. Y.) 540.

Act to be Performed on Delivery.

The sale is likewise conditional where delivery is not to be made until the giving of a note for the price (*Osborn v. Gantz*, 60 N. Y. 540; *Adams v. Roscoe Lumber Co.* 159 N. Y. 176, 53 N. E. 805; *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437), or the payment of the price in labor (*Strong v. Taylor*, 2 Hill. (N. Y.) 326). Title does not pass until the note is given or the labor done.

Waiver of Condition.

The condition is waived and title passes if the goods are unconditionally delivered to the buyer. Whether or not such delivery has been made is a question of fact dependent on the circumstances of each case. The following cases discuss the question: *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397; *Husted v. Ingraham*, 75 N. Y. 251; *Parker v. Baxter*, 86 N. Y. 586; *Adams v. Roscoe Lumber Co.*, 159 N. Y. 176, 53 N. E. 805; *Potter Printing Press Co. v. Schreiner*, 47 App. Div. 531, 62 N. Y. S. 492; *Hirsch Lumber Co. v. Hubbell*, 143 App. Div. 317, 128 N. Y. S. 85.

The New York rule regarding cash sales would seem to be unaffected by Rule 1 of section 100 since that rule applies only to un-

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conditional sales, and the New York courts have regarded cash sales as conditional sales. Rule 4, subdivision 2 would also seem to have no effect on the pre-existing law because it applies only to cash sales of unascertained goods.

³ Goods Not in Deliverable State. This rule states a well recognized principle of the common law. "It is a familiar principle that if anything remains to be done by a seller of merchandise to put the same in a deliverable shape, so that the purchaser has an option of refusal to accept, in case such things are not done, no title passes." *Blossom v. Shotter*, 59 Hun 481, 13 N. Y. S. 523, affirmed 128 N. Y. 679, 29 N. E. 145. See also *Pinckney v. Darling*, 3 App. Div. 553, 38 N. Y. S. 411, affirmed 158 N. Y. 728, 53 N. E. 1130; *Dexter v. Norton*, 47 N. Y. 62, 64, 7 Am. Rep. 415. In *Automatic Time Table Advertising Co. v. Automatic Time Table Co.*, 208 Mass. 252, 94 N. E. 462, this section of the Sales Act was referred to and it was held that title to certain machines agreed to be sold did not pass because they were incomplete. The court said (page 256): "Since something had to be done to the machines to put them in a deliverable state and a different intention did not appear, the property in the six machines here in question did not pass on the execution of the contract. The transaction was governed by the sales act (St. 1908, c. 237), and it is there so provided in § 19, Rule 2. The rule was the same at common law." *Property in Vessels Under Construction.*

Thus it has been held that, where a barge is to be constructed and paid for by installments, the property in no part of the barge vests until it is complete. *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55. For other cases upon the passing of the property in vessels, see *Seymour v. Montgomery*, 1 N. Y. 463; *Interstate Steamboat Co. v. Syracuse First Nat. Bank*, 87 Hun 93, 33 N. Y. S. 966.

Illustrative Cases.

The following cases illustrate the principle of Rule 2: *Bayne v. Hard*, 77 App. Div. 251, 79 N. Y. S. 208, affirmed 174 N. Y. 534, 66 N. E. 1104 (property in coffee did not pass till gradings were made); *McConihe v. New York, etc., R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420 (railroad cars incomplete; no title passed); *Decker v. Furniss*, 14 N. Y. 611 (seller to fit up boat); *Joyce v. Adams*, 8 N. Y. 291 (goods to be weighed to ascertain identity); *McDonald v. Hewett*, 15 Johns. (N. Y.) 349, 8 Am. Dec. 241 (timber to be inspected before acceptance); *Halterline v. Rice*, 62 Barb. (N. Y.) 593 (cutter to be finished). *Weighing, Measuring or Testing.*

The English Sale of Goods Act provides in section 18, rule 3, that where weighing, measuring or testing the goods is necessary

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to ascertain the price, title does not pass. But this provision was not adopted in the Sales Act and is not in accord with the common law of New York. In speaking of the rule suspending the passing of title till weighing, measuring or testing, the court, in *Groat v. Gile*, 51 N. Y. 431, 437, says: "That rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of ascertaining the total value thereof at certain specified rates or a designated fixed price." In other words, the rule in New York has had no application except as a rule of designation for the purpose of making the subject matter of the sale ascertained. For additional cases holding to this effect, see the following: *Blossom v. Shotter*, 59 Hun 481, 13 N. Y. S. 523, affirmed 128 N. Y. 679, 29 N. E. 145; *Crofoot v. Bennett*, 2 N. Y. 258; *Bradley v. Wheeler*, 44 N. Y. 495; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 86; *Sanger v. Waterbury*, 116 N. Y. 371, 22 N. E. 404; *Pinckney v. Darling*, 3 App. Div. 553, 38 N. Y. S. 411, affirmed 158 N. Y. 728, 53 N. E. 1130; *Good v. Curtis*, 31 How. Pr. (N. Y.) 4.

But a few older cases seem to give to weighing or measuring, when necessary merely to fix the price, the effect of suspending the passing of the property. See *Uhlman v. Day*, 38 Hun (N. Y.) 298; *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 31; *Olyphant v. Baker*, 5 Den. (N. Y.) 379; *Rapelye v. Mackie*, 6 Cow. (N. Y.) 250; *Chapin v. Potter*, 1 Hilt. (N. Y.) 366. In view of the later expressions of the Court of Appeals, however, these cases can hardly be considered to express the law upon this point.

⁴ **Sale or Return.** Rule 3, paragraph 1, is believed to state the common law of New York. Thus in *Greacen v. Poehlman*, 191 N. Y. 493, 84 N. E. 390, a contract was made for the sale of certain boots with privilege of return, and the boots were taken in June and return made in December, and it was held that it should have been left to the jury to determine whether the return was within a reasonable time. The Court said: "As no time was fixed by the contract testified to by the defendant within which the boots were to be returned, the defendant's legal obligation was to do that within a reasonable time. Whether they were in fact returned within a reasonable time was, under the circumstances here shown, a question that should have been submitted to the jury." The court also quoted with approval (page 497) the following extract from *Parsons on Contracts* (vol. 1, 539): "There is another class of sales on condition, often called 'contracts

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of sale or return.' In these the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time; or a reasonable time; and if he fails to exercise this option by so returning them, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered."

Illustrative Cases.

As sustaining the rule laid down in the Sales Act, see also *Levis v. Pope Motor Car Co.*, 202 N. Y. 402, 406, 407, 95 N. E. 815 (automobile sold on sale or return contract; title vested subject to being divested by exercise of option); *Wooster v. Sage*, 67 N. Y. 67 (purchase of bonds with privilege of returning if buyer "became sick of them"); *Fiss Horse Co. v. Schwartzchild*, 121 N. Y. S. 292 (sale of horse with option to return in a couple of days; failure to return in 48 hours renders buyer absolutely liable for price); *Waters' Patent Heater Co. v. Tompkins*, 14 Hun (N. Y.) 219 (return to agent of seller); *Lyon v. Motley*, 9 Misc. 500, 30 N. Y. S. 218 (obligation to return not satisfied by return to railroad depot at place where buyer does business; must return to seller's place of business and pay return freight); *Costello v. Herbst*, 18 Misc. 176, 41 N. Y. S. 574; *Lord v. Kenny*, 13 Johns. (N. Y.) 219 (horse sold on sale or return contract); *Giles v. Bradley*, 2 Johns. Cas. (N. Y.) 253 (sale of negro on sale or return contract); *Crandall v. Haskins*, 45 Hun 10, 10 N. Y. St. Rep. 107 (return within a reasonable time); *Pinney v. Hall*, 1 Hill (N. Y.) 89 (agreement to take other goods in place of those to be returned); *Sutton v. Crosby*, 54 Barb. (N. Y.) 80 (return of goods by carrier; when title revests in seller).

⁵ **Sale on Approval.** Rule 3, paragraph 2, is declaratory of the common law. Thus in *Carter v. Wallace*, 32 Hun (N. Y.) 384, the buyer of a horse agreed to take the horse and use it and if the horse drove to suit him, he was to keep it and pay \$130 therefor. The animal died shortly after delivery and before any approval had been expressed, and it was held that the seller was not entitled to recover the purchase price. The title would not pass until approval. And in *Fiss Horse Co. v. Kiernan*, 108 N. Y. S. 1105, it was held that where a buyer takes a horse with a right of trial for only 48 hours before accepting or returning it, a retention of it for a longer time than 48 hours, even though but a short time, transferred the property in the horse to the buyer.

Illustrative Cases.

For similar cases see *Russell v. Wolff*, 19 Misc. 536, 43 N. Y. S. 1077; *Cornell v. Fox*, 95 App. Div. 71, 88 N. Y. S. 482; *McDonald v. Pierson*, 38 Barb. (N. Y.) 128. The rule is also well settled in other

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jurisdictions. In *re Froehlich Rubber Refining Co.*, 139 Fed. 201; *Allyn v. Burns*, 37 Ind. App. 223, 76 N. E. 636; *Dando v. Foulds*, 105 Pa. St. 74; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346.

6 Appropriation to the Contract. Rule 4, paragraph 1, is in accord with the common law of this state with the possible exception noted below relating to the forcing of title on a buyer by means of tender. Thus in *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619, the contract was for the sale of lumber to be cut and dressed by the seller, and the buyer selected the piles from which his lumber was to be taken and directed that when ready it should be delivered on the seller's dock and notice of readiness to deliver given. The lumber was destroyed by fire after it was made ready for delivery, placed on the seller's dock and notice given, but before defendant had taken it away or exercised any control over it. It was here held that there had not been sufficient appropriation by the seller to pass title. In discussing the subject of appropriation, the court said (pp. 365-366): "Proceeding on the view that this was an executory contract, it might still pass into the class of executed sales by acts of 'subsequent appropriation.' In other words, if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, there may be an executed sale and the property in the goods may pass to the purchaser. * * * This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him. * * * This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be manufactured according to an order, it would seem that the mind of the purchaser after the manufacture was complete, should act upon the question whether the goods had complied with the contract. * * * This point may be illustrated by the case of a sale by sample, where the seller agrees to select from a mass of products certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason, that the purchaser has still remaining a right to determine whether the selected goods correspond with the sample."

Incorporation of Material.

When the seller furnishes the larger part of the materials to be

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used in making watches, although the buyer furnishes minor parts, the title to the watch movements remains in the seller until they are complete and delivered. *Matter of Non-Magnetic Watch Co.*, 89 Hun 196, 34 N. Y. S. 1017. The property in woodwork to be built into a house is not appropriated to the contract so as to pass title to the owner of the house until it is incorporated into the house. *Johnson v. Hunt*, 11 Wend. (N. Y.) 135.

The buyer's assent to appropriation may precede appropriation, but the goods appropriated by the seller must meet the requirements of the contract. *Mitchell v. LeClaire*, 165 Mass. 308, 43 N. E. 117.

Effect of Tender in New York.

A peculiar doctrine of the New York common law was that, where the seller tendered goods in accordance with the contract and the buyer refused to accept them, the seller could recover the contract price "in which case he holds the property as trustee for the vendee, and is bound to deliver it, whenever demanded, upon receiving payment of the price." *Hayden v. Demets*, 53 N. Y. 426, 431. See also *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190. This rule meant that the property in goods could be forced upon the buyer by tender, so that apparently the buyer's consent was not necessary to the appropriation of the goods in such a case. In this respect possibly the common law was out of accord with the rule of the act. Section 144, post, continues the New York rule regarding the effect of tender only to a limited extent, namely, in cases where the goods are not readily resalable. See notes to section 144, post.

For a somewhat peculiar case upon the effect of refusal of tender upon the passage of the property, see *Schwab v. Oatman*, 198 N. Y. 545, 92 N. E. 1101, reversing 129 App. Div. 274, 113 N. Y. S. 910, on the dissenting opinion of McLaughlin, J., below.

7 Appropriation by Delivery to Carrier. "When goods are ordered to be sent by a carrier, a delivery to the carrier operates as a delivery to the purchaser, in whom the property immediately vests, subject to the vendor's right of stoppage in transitu, and the goods, in the course of their transit, are at the risk of the purchaser." *Baker v. Bourcicault*, 1 Daly (N. Y.) 23, 28. Thus upon the sale of 500 bags of cocoa to be shipped from Bahia to New York, the buyer suffers the loss occasioned during transit by reason of the cocoa becoming wet. The title passed to the buyer upon the shipment at Bahia, that being an effectual appropriation. *Mee v. McNider*, 109 N. Y. 500, 17 N. E. 424. See also *Rodgers v. Phillips*, 40 N. Y. 519; *Krulder v. Ellison*, 47 N.

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Y. 36, 7 Am. Rep. 402; *Smith v. Edwards*, 29 Hun (N. Y.) 493, 496; *People v. Haynes*, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; *White v. Schweitzer*, 147 App. Div. 544.

Particular Carrier Named.

But where the buyer directs the seller to ship the goods by a particular carrier and the seller sends them by another carrier, title does not pass to the buyer and the creditors of the buyer can obtain no rights by levying on the goods while in transit. *Hills v. Lynch*, 3 Robt. (N. Y.) 42. And where goods are ordered sent by canal and they are shipped by land, delivery to the carrier does not pass the title to the buyer. *Corning v. Colt*, 5 Wend. (N. Y.) 253. See also *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787. The words parenthetically placed in this rule, namely, "whether named by the buyer or not," probably refer to the situation where the buyer has named no carrier at all, and not to that where the carrier has specified the means of transit. If the words of the section indicated that the seller was at liberty to select any carrier he desired, regardless of the buyer's expressed wish, the rule would apparently change the common law.

Where the contract of sale does not expressly or impliedly give the seller authority to dispatch the goods to the buyer, the seller cannot appropriate the goods to the contract and pass title to the buyer by delivery to a carrier. *Hague v. Porter*, 3 Hill (N. Y.) 141.

For the exception existing under section 101, see notes to that section, post.

C. O. D. Shipments.

The last sentence of Rule 4 is believed to be contrary to the common law of this state. The decisions are few, and the subject has been in doubt. Thus in *Baker v. Bourcicault*, 1 Daly (N. Y.) 23, it was held that where goods were shipped C. O. D. from New York to New Orleans and were lost at sea, the loss fell on the seller, since delivery and payment were to be simultaneous acts and title was not to pass until delivery. And in *Conway v. Bush*, 4 Barb. (N. Y.) 564, the action was trover by a buyer against a carrier to recover the value of hops sold to the plaintiff and shipped to the defendant to be delivered on the payment of the purchase price. It was held that the title did not pass until payment and, plaintiff having neglected to call for the goods after notice, and not having paid for them, the seller was justified in shipping them to another place.

In *Higgins v. Murray*, 73 N. Y. 252, tents were manufactured to order and shipped C. O. D. It was held that the contract was one for work and labor and the defendant was liable for the contract price, even though the tents were lost during shipment. The court said (page

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255): "It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." The last case is hardly an authority because of the fact that the court considered the contract not one for the sale of goods, but for work and labor.

It is submitted that the few adjudications upon the subject in New York have tended to withhold the passing of the title until payment and hence conflict with the rule of the Sales Act, as expressed in the last sentence of Rule 4.

8 Delivery at Particular Place. The common law rule is believed to be expressed in Rule 5. Thus in *Pacific Iron Works v. Long Island R. Co.*, 62 N. Y. 272, it was held that where a seller contracts to ship goods by boat City of Bridgeport, pay the freight and deliver the goods on board the boat at the buyer's place of residence, the title to the goods passes to the buyer when the goods arrive at his place of residence on board the vessel named, regardless of whether the buyer called for and received the goods.

"Had the consignor agreed with the consignees to deliver the goods to them at Rochester, the rule would be different. Then the consignees would not be the owners till delivery at Rochester." *Krulder v. Ellison*, 47 N. Y. 36, 40, 7 Am. Rep. 402.

For cases supporting Rule 5, see *Gourd v. Healy*, 137 App. Div. 323, 122 N. Y. S. 7; *Gass v. Astoria Veneer Mills*, 121 App. Div. 182, 105 N. Y. S. 794; *Manufacturers' Commercial Co. v. Rochester R. Co.*, 117 N. Y. S. 989; *Ludlow v. Bowne*, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277; *Woodford v. Patterson*, 32 Barb. (N. Y.) 630. *Terry v. Wheeler*, 25 N. Y. 520, is apparently contra, but it would seem that the presumption ordinarily arising in the case of a contract to deliver at a particular place was overcome in that case by other evidence.

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§ 101. RESERVATION OF RIGHT OF POSSESSION OR PROPERTY WHEN GOODS ARE SHIPPED. 1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.¹

2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.²

3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.³

4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading

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he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.⁴

Effect of Section. The section is believed to be declaratory of the common law. The right here discussed has been referred to commonly as the "*jus disponendi*" or "right of disposal." This section of the Sales Act differentiates between a reservation of the property in the goods and a reservation of the right to possession merely. The common law cases appear not to have made this distinction clearly. Under the Sales Act bills of lading are given a wider degree of negotiability than they possessed at common law (see sections 108–121, post), and this change may have some effect on the right of disposal exercised through bills of lading. While the effect of acts tending to reserve to the seller rights relating to the goods is not as clearly defined in the common law cases cited below as in the Sales Act, it is believed that the general results accomplished are the same.

English Act. The Sale of Goods Act makes similar provisions in its section 19, except that the last sentence of

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sub-section 2, the whole of sub-section 3 and the last sentence of sub-section 4 of the American act are not found in the English act. See appendix for the text of the section. In *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 2 Q. B. 61, 79 L. T. N. S. 55, it was held that, where a buyer receives at the same time from the seller a bill of lading and draft drawn on him, he is bound to accept the draft if he keeps the bill of lading, and if he refuses to accept the draft and retains the bill of lading and endorses it to a *bona fide* holder, the latter acquires no right to demand the goods from the carrier. The case seems to be affected by the English Factor's Act, although decided under the Sale of Goods Act also.

¹ **Reservation of Rights to Seller.** Section 101 materially qualifies the second subdivision of rule 4 under section 100. Shipment does not always constitute an appropriation to the contract. For evidence that the seller could reserve rights of property and possession after shipment at common law, reference is made to the cases cited under the remaining notes upon this section. Sub-section 1 states the general principle that the right of reservation exists. Sub-sections 2, 3 and 4 illustrate the common methods of effecting reservation.

² **Bill of Lading Taken to Seller's Order.** "If the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, he thereby reserves to himself a power of disposing of the property, and consequently there is no final appropriation, and the property does not on shipment pass to the purchaser." *Farmers', etc., Nat. Bank v. Logan*, 74 N. Y. 568, 578. See also *Dows v. National Exch. Bank*, 91 U. S. 618, 23 U. S. (L. ed.) 214.

Rights of Correspondent Advancing Money.

A correspondent of the consignee of goods who advances money and takes the bill of lading in his own name has rights similar to those of a seller treating a bill of lading similarly. The rule is laid down in *Moors v. Kidder*, 106 N. Y. 32, 40 N. E. 818, as follows: "Where a commercial correspondent, however set in motion by a principal for whom he acts, advances his own money or credit

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for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase price is paid." But the ownership of the correspondent in this situation is "ownership so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading." *Drexel v. Pease*, 133 N. Y. 129, 136, 30 N. E. 732.

Stoppage.

Where a seller takes a bill of lading in his own name, the delivery of the goods to a ship chartered by the buyer is not an absolute delivery, and the transit of the goods does not cease with delivery on board ship so as to prevent a subsequent stoppage in transitu. *Gossler v. Schepler*, 5 Daly (N. Y.) 476.

Discounting Bank.

The effect of taking the bill of lading in the name of an agent of the seller, such as a bank, is the same as that of taking the bill to the seller himself. *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283. Where a seller takes a bill of lading by which goods are deliverable on the order of a bank, and the bank discounts a draft on the buyer, the bank acquires "a lien upon it or title to it," and the buyer cannot transfer the property so as to defeat the right of the bank. *Mechanics', etc., Bank v. Farmers', etc., Nat. Bank*, 60 N. Y. 40, 47.

Provision for Notice of Arrival.

A direction in a bill of lading, running to the consignor, that the carrier shall notify the buyer of the arrival of the goods, does not give the buyer any rights in the goods, and the carrier is liable if he delivers to the buyer without directions from the consignor. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 13 N. E. 587.

Presumption Rebuttable.

But the presumption that the property in the goods is reserved by retention of a bill of lading in the seller's name is not conclusive, and may be rebutted by evidence that the seller intended the goods should become the buyer's at the time of shipment. *Straus v. Wessel*, 30 Ohio St. 211.

³ Retention of Bill to Buyer's Order. Where a seller ships goods, takes the bill of lading in the name of the buyer as consignee, and retains the bill of lading in his possession, neither title nor right to possession is in the buyer. "The right of a shipper to revoke a con-

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signment, after the shipment has been made and a bill of lading making the goods deliverable to a consignee by name has been signed, and before the bill of lading is delivered to the consignee, cannot be questioned either on principle or authority, because until the bill of lading is parted with, no title to the property, nor any right to the possession or ownership, passes from the owner or shipper." *Hauterman v. Bock*, 1 Daly (N. Y.) 366, 369.

Effect of Discounting Draft with Bill Attached.

"It is settled beyond dispute in this state, that the discount of a draft drawn by a consignor upon his consignee which is accompanied by the delivery of a bill of lading to the party making the advance, passes to such party not only the legal title to such property, but, in the eye of the law, the transfer of the bill of lading is regarded as an actual delivery and an actual change of possession of the property." *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 250, 15 N. E. 311. Hence it was held in this case that a bank taking a bill of lading by which goods were consigned to the buyer, with drafts on the buyer attached, acquired a legal title to the goods, so that the buyer was liable to the bank for the value of the goods.

Where goods are consigned by A to B and the bills of lading and drafts attached are delivered to a bank which discounts the drafts, the bank acquires title to the goods represented by the bills, even though the bills were apparently non-negotiable and ran to the consignee. The title is solely for the purpose of allowing the bank to obtain the advances made by it. *Matter of Non-Magnetic Watch Co.*, 89 Hun 196, 34 N. Y. S. 1017.

Carrier's Liability for Conversion.

See *Bailey v. Hudson River R. Co.*, 49 N. Y. 70, in which case it was held that where goods are shipped in payment of an advance made to the seller by the buyer, and the bill of lading calls for the delivery of the goods to the buyer, the carrier is liable to the buyer for conversion of the goods if he delivers them to another than the buyer by order of the seller, even though the seller did retain possession of the bill of lading.

These cases tend to give to reservation of possession of the bill running to the buyer a somewhat wider effect than the Sales Act. They seem to give to the seller in such a case rights of property as well as rights to possession.

⁴ **Bill Sent with Draft Attached.** "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends it forward with a draft attached, and with direc-

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tions that it is not to be delivered to the purchaser until payment of the draft, the appropriation is not absolute, and until payment or tender of the price, is conditional only, and until then the property of the goods does not pass to the purchaser." *Farmers' etc., Nat. Bank v. Logan*, 74 N. Y. 568, 578, 579. In this case it was held that, where a seller takes a bill of lading for goods shipped in such form that the goods are deliverable to a bank with whom he discounts a draft on the buyer, and the bank endorses the bill and stamps a statement thereon that the bill is to be delivered on acceptance of the draft, and the buyer accepts the draft and receives the bill of lading, he cannot transfer the goods to a *bona fide* purchaser so as to give him a better title to them than the bank, the draft not having been paid. The right to control or dispose of the goods until payment of the draft was reserved by this procedure. Those dealing with the buyer were charged with notice of the rights of the bank as evidenced by the bill of lading.

Draft Sent to Bank.

Where a seller ships goods to a buyer but consigns them to himself and sends the bill of lading with draft attached to a bank, with directions to deliver the goods to the buyer on payment of the draft, the buyer reserves possession of the property as security for the payment of the price, although the title has passed to the buyer. *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012.

Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee, and procures the same to be discounted at a bank upon the security of the bill of lading, which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon the acceptance of the draft; upon such acceptance the title passes to the acceptor; but upon the refusal to accept, the title continues unimpaired, and upon the receipt by the consignee of the property, and its conversion, he is liable to the bank for the money advanced upon it. *Marine Bank v. Wright*, 48 N. Y. 1.

Rights of Buyer When He Receives Draft and Bill.

Where a seller takes a bill of lading in the name of the buyer, and it is sent on to the buyer with instructions that he is not entitled to the goods until he pays a draft which will later be drawn on him, the buyer cannot acquire title to the goods without paying the draft. *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631.

Where a seller discounts a draft on the buyer with a bank, with bill of lading attached, and the bank sends the draft with bill attached

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to the buyer for acceptance, the buyer, by detaching the bill from the draft and getting possession of the goods, cannot, without payment of the draft, acquire title to the goods, and is liable to the bank for the conversion of the goods. *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290. Where the seller ships goods in his own name, and draws a draft with bill of lading attached upon the buyer, payable at a bank, there is a reservation of the "possession and control" of the property until the payment of the draft. *Plumb v. Bridge*, 128 App. Div. 651, 113 N. Y. S. 92.

Where stock is delivered with a draft for the price attached, delivery is conditional on payment and the shares transferred on the books of the corporation by virtue of this possession are held under a defeasible title. *Burnham v. Eyre*, 123 App. Div. 777, 108 N. Y. S. 452, affirmed 196 N. Y. 560, 90 N. E. 1156. Where a seller ships goods to the buyer, takes a bill of lading to his own order, endorses it to the buyer, and sends the bill thus endorsed, with draft attached, to a bank for collection from the buyer, the buyer has no right to the possession of the goods until the payment of the draft, nor may he inspect the goods before such payment. *Whitney v. McLean*, 4 App. Div. 449, 38 N. Y. S. 793. Where a seller ships goods to a buyer and sends the bills of lading with drafts for the price attached to an agent of the buyer, who accepts them and sends the bills to the buyer, the buyer acquires no title to the goods if the drafts are not paid, and the seller may resume control upon default in payment of the drafts. *Ainis v. Ayres*, 62 Hun 376, 16 N. Y. S. 905.

Regarding this sub-section the Commissioners on Uniform State Laws have added the following note (*American Uniform Commercial Acts*, p. 85); "Sub-section (4) substantially follows the English Act so far as the words 'If, however.' The proviso beginning 'If, however,' is not in the English Act. It expresses, nevertheless, the English Law, because of the last Factor's Act. *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643. It undoubtedly is in accordance with mercantile understanding and convenience. The seller has trusted the buyer with the possession of the document of title and should bear the consequences. See *Mechem*, § 166."

§ 102. SALE BY AUCTION. In the case of sale by auction—

1. Where goods are put up for sale by auction in lots each lot is the subject of a separate contract of sale.¹

2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.²

3. A right to bid may be reserved expressly by or on behalf of the seller.³

4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.⁴

Effect of Section. Sub-section 1 of section 102 changes the common law of New York in relation to the entirety of the contract where several lots are offered at one auction. See note 1 below. Otherwise the section expresses the common law.

The act incorporating the Sales Act into the New York Personal Property Law (chapter 571, Laws of 1911) repealed section 20 of the General Business Law which read as follows: “§ 20. *Conduct of auction sales.* Goods sold

at auction shall, in all cases, be struck off to the highest bidder. When struck off, if the contract be not immediately executed by the payment of the price or the delivery of the goods, the auctioneer shall enter in a sale-book kept by him for that purpose a memorandum of the sale, specifying the nature, quantity and price of the goods, the terms of sale and the names of the purchaser and of the person on whose account the sale is made." See Laws 1911, ch. 571, § 2.

The following provision of section 31 of the Personal Property Law, which was attached to the paragraph containing the old Statute of Frauds relating to sales of personal property, was not repealed: "If goods be sold at public auction, and the auctioneer at the time of the sale, enters in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale was made, such memorandum is equivalent in effect to a note of the contract or sale, subscribed by the party to be charged therewith." See appendix.

English Act. Section 58 of the Sale of Goods Act is the substantial equivalent of this section, except that the last clause of sub-section 2 of the American section is not contained in the English section. The following cases have been decided in England since the taking effect of the act: *McManus v. Fortescue*, [1907] 2 K. B. 1, 96 L. T. N. S. 444, holding that where an auction sale is conducted subject to an unnamed reserve price, each bid is an offer conditional upon its being up to the reserve price; and the fall of the hammer is an acceptance of the highest bid conditional upon its being as high as the reserve price; *Rainbow v. Howkins*, [1904] 2 K. B. 322, 91 L. T. N. S. 149, holding that after the fall of a hammer at an auction

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sale the contract is perfected and the title passes to the buyer, even though the sale has been made at a price below that named in private instructions from the owner to the auctioneer; *Fenwick v. Macdonald*, Sc. Ct. Sess. 6 F. 850, holding that until the fall of the hammer on an auction sale, the seller may retract his offer as well as the bidder withdraw his bid.

¹ Sale in Lots. This sub-section seems to alter the common law. Thus in *Mills v. Hunt*, 17 Wend. (N. Y.) 333, 20 Wend. (N. Y.) 431, it was held that, where five parcels of goods were separately struck off to one buyer at an auction sale, there was but one contract and the acceptance and receipt of four of the parcels rendered the entire contract enforceable under the Statute of Frauds. Under the Sales Act apparently each parcel would have been the subject of a separate contract of sale. See also *Gray v. Walton*, 107 N. Y. 254, 259, 14 N. E. 191.

² When Sale Complete. This sub-section is considered declaratory. "In common parlance, and in the language of the auction room, property is understood to be 'struck off' or 'knocked down' when the auctioneer by the fall of his hammer or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale. Three things are necessary to complete an auction sale. There must be a bidder, the property must be 'struck off' or 'knocked down,' and the person to whom it is struck off must complete his purchase by complying with the terms of the sale." *Sherwood v. Reade*, 7 Hill (N. Y.) 431, 439. The bidder may withdraw his bid at any time before the hammer falls. *Hibernia Sav., etc., Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Fisher v. Seltzer*, 23 Pa. St. 308, 62 Am. Dec. 335. This result is reached on the theory that each bid is an offer, and that the auctioneer merely invites offers. It is obvious that, if the contract is incomplete as to the bidder, it is also incomplete as to the seller and he may withdraw at any time before the hammer falls.

³ Seller May Reserve Right to Bid. "There is no doubt that it is competent for the owner of property who puts it up at auction to use some means to protect his interests and to see that his property is not sacrificed. It is conceded that he may do this either by fixing a price below which the property shall not be sold, and announcing that at the sale, or by publicly reserving to himself the right to make one or more bids if his interests shall require it. * * * But that is a very

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different thing from giving private instructions to the auctioneer, or from privately procuring one to bid upon the sale in the interest of the owner, who is not to buy the property if he should be the highest bidder. The essence of a sale at auction is that the property offered shall go to the highest real bidder. * * * For this reason it would seem, upon principle, that the private employment of a puffer by an owner at an auction sale rendered the sale void, and relieved the person to whom the property was struck off from the necessity of performing his contract." *Bowman v. McClenahan*, 20 App. Div. 346, 347, 348, 46 N. Y. S. 945. See *Minturn v. Main*, 7 N. Y. 220.

Right of Seller to Refuse Bids.

"It is, we think, well settled that he may refuse a bid tendered in bad faith or proffered by a person who is insolvent or otherwise disabled from completing the purchase; otherwise the whole object of the sale might be defeated. Within the same reasoning comes the right, which we think he possesses, of refusing to accept trifling advances offered by bidders in the course of the sale, especially where that kind of bidding is initiated at the outset and the sum so offered is utterly incommensurate with the actual known value of the property." *Taylor v. Harnett*, 26 Misc. 362, 366, 55 N. Y. S. 988. The seller may fix a minimum price on an auction sale. *Hazul v. Dunham*, 1 Hall (N. Y.) 655.

For an instance of a lawful sale at which an agent of the seller took part in the bidding, see *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L.R.A. 867, 82 Am. St. Rep. 728.

4 Bids by Seller or Puffer. See note 3 above for evidence that sub-sections 3 and 4 express the common law. A question sometimes arises whether an agreement that one shall bid and another refrain from bidding at an auction sale is valid. Upon this question, see *Hopkins v. Ensign*, 122 N. Y. 144, 150, 23 N. E. 306, 9 L.R.A. 731, in which case the court says: "It is now settled that agreements between two or more persons that all but one shall refrain from bidding, and permitting that one to become the purchaser, are not necessarily and under all circumstances void. They may be entered into for a lawful purpose, and from honest motives, and in such cases will be upheld, and they will not vitiate the purchase or necessarily destroy the completed contracts to which they refer and in respect to which they are made." But see *Doolin v. Ward*, 6 Johns. (N. Y.) 194, for the early view of these agreements. For instances of agreements not to compete held valid, see *Marsh v. Russell*, 66 N. Y. 288; *Marie v. Garrison*, 83 N. Y. 14.

§ 103. **RISK OF LOSS.** Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not,¹ except that—

(a) Where delivery of goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.²

(b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.³

Effect of Section. The section is probably declaratory of the common law, except as to subdivision (b), although the situation involved in subdivision (a) has been the subject of much conflicting discussion. See notes below.

Concerning this section the Commissioners on Uniform State Laws make the following note (American Uniform Commercial Acts, p. 87): "The exception (a) is not contained in the English act. Otherwise the section is in substance the same as section 20 of the English act. The new exception represents the weight of authority and seems sound on principle. The principal situation at which it is aimed is where a conditional sale has been made, the goods delivered to the buyer, and very likely in use by him. The

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title is retained instead of taking a mortgage back, as would be done in the case of real estate. The beneficial interest is in the buyer, and the risk should be on him. See 9 Harv. L. Rev. 109; Mechem, § 635. Where goods are sent in compliance with an order, but marked C. O. D., even though the effect of this were to withhold the title (as to which, however, see section 19, Rule 4 (2)), the risk would be thrown on the buyer. See Mechem, § 740, note (p. 616)."

English Act. Section 20 of the Sale of Goods Act covers the same ground as section 103, but the English act makes no provision for the situation stated in subdivision (a).

¹General Rule as to Risk of Loss. "The risk attends upon the title, not upon the possession, where there is no special agreement upon the subject." *Terry v. Wheeler*, 25 N. Y. 520, 524. Risk of loss may be separated from ownership. *Bigler v. Hall*, 54 N. Y. 167. In a leading English case (*Martineau v. Kitching*, L. R. 7 Q. B. 436, 453) the court, speaking through Blackburn, J., says: "As a general rule, *res perit domino*, the old civil law maxim, is a maxim of our law; and when you can shew that the property passed, the risk of the loss, *prima facie*, is in the person in whom the property is. If, on the other hand, you go beyond that, and shew that the risk attached to the one person or the other, it is a very strong argument for shewing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other."

Illustrative Cases.

For cases illustrating the rule laid down in the first paragraph of the section, see *Lansing v. Turner*, 2 Johns. (N. Y.) 13; *Corrigan v. Sheffield*, 10 Hun (N. Y.) 227; *Carter v. Wallace*, 32 Hun (N. Y.) 384; *Koon v. Brinkerhoff*, 39 Hun (N. Y.) 130; *Joyce v. Adams*, 8 N. Y. 291; *McConihe v. New York, etc., R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420; *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498; *Bradley v. Wheeler*, 44 N. Y. 495; *Foot v. Marsh*, 51 N. Y. 288; *Kein v. Tupper*, 52 N. Y. 550; *Purcell v. Jaycox*, 59 N. Y. 288; *Pacific Iron Works v. Long Island R. Co.*, 62 N. Y. 272; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42; *Mee v. McNider*, 109 N. Y. 500, 17

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N. E. 424. A case indirectly bearing upon the subject and decided under the American Sales Act is *Automatic Time Table Advertising Co. v. Automatic Time Table Co.*, 208 Mass. 252, 94 N. E. 462.

Where goods are shipped to the buyer and thereby the title passes to him, but he has the right of inspection to see whether they correspond with a sample, and the goods are destroyed before inspection can be made, the loss falls on the buyer. *Wadhams v. Balfour*, 32 Ore. 313, 51 Pac. 542.

² Risk Where Title Is Reserved as Security. The following quotations from the work of the draftsman of the act show its theory upon the matter covered by sub-section (a): "Risk of loss should properly fall upon the party who has the beneficial incidents of title rather than upon the party who has the legal title alone." (*Williston on Sales*, p. 525). "That the risk should be thrown upon the buyer if the seller retains title merely to enforce performance by the buyer of his obligations under the contract, as enacted in the Sales Act, is a consequence of the theory that such a bargain is, in effect, though not in form, a sale to the buyer and a mortgage back by him of the property to secure the price." (*Williston on Sales*, p. 458).

New York Cases.

The New York case most squarely presenting the question is *National Cash Register Co. v. South Bay Club House Assoc.*, 64 Misc. 125, 118 N. Y. S. 1044. In that case a cash register had been delivered under a conditional contract of sale and the buyer had given a note for the price. The register was destroyed by accident before payment of the note and an action was brought to collect the note. The court allowed the plaintiff to recover, holding that the consideration for the note was the delivery of the register to the buyer, and that the plaintiff had done all it was obliged to do under the contract. The court says (p. 127): "The plaintiff had nothing further to do. The title was retained by it merely as security for the unpaid purchase price." The court refers to apparently contrary dicta in *Ballard v. Burgett*, 40 N. Y. 314, and *Herring v. Hoppock*, 15 N. Y. 409, and distinguishes those cases. It suggests *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626, as a supporting authority.

In *Higgins v. Murray*, 73 N. Y. 252, the contract was one of work and labor, namely, the construction of a tent, which was destroyed while in transit. The sale was a C. O. D. sale. The court held that the loss fell upon the buyer. Apparently the buyer was liable for the price, irrespective of the state of the title of the goods because the contract was considered one for work and labor. In *Morey v. Medbury*, 10 Hun (N. Y.) 540, it was held that where a seller has delivered

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goods to a station agent to be delivered by him to the buyer upon payment of the price, and has thus reserved his lien, the property nevertheless passed to the buyer, and, when the goods are stolen, the loss falls on the buyer. See also *Humeston v. Cherry*, 23 Hun (N. Y.) 141. But see *Wolf v. Di Lorenzo*, 21 Misc. 521, 47 N. Y. S. 719; *Edward Thompson Co. v. Vacheron*, 69 Misc. 83, 125 N. Y. S. 939.

Other American Authorities.

The authorities have been conflicting in America, the following cases holding that the buyer has the risk of loss in a conditional sale: *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 283, 10 S. Ct. 999, 34 U. S. (L. ed.) 349; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54; *Tufts v. Griffin*, 107 N. C. 47, 12 S. E. 68, 10 L.R.A. 526, 22 Am. St. Rep. 863, and other authorities being contra: *Swallow v. Emery*, 111 Mass. 355; *Sloan v. McCarty*, 134 Mass. 245.

Where the property is retained for security by means of a bill of lading, it has been stated in dictum that the risk of loss is on the buyer (*Farmers' etc., Nat. Bank v. Logan*, 74 N. Y. 568, 581), a view in accord with that of the Sales Act.

³ Delivery Delayed Through Fault. Regarding sub-section (b) the draftsman of the act says: "It seems probable from the authorities cited, that the provision of the English Sale of Goods Act, copied in the American Sales Act, goes farther in throwing the risk upon the party in default than the common law has hitherto gone. The original draft of the English act provided that the risk should be upon the party in fault 'as regards any loss which would not have occurred but for such fault.' The expression 'might not have occurred' was substituted at the instance of Lord Watson. The effect of this substitution seems to be to shift the burden to the wrongdoer to show that his default was not a cause of the loss. It seems reasonable, in case of doubt as to the proximate cause of the loss by the delay, that the party in default who is confessedly a wrongdoer should suffer rather than the innocent party." (*Williston on Sales*, pp. 466-467).

New York View.

The question arose in *McConihe v. New York, etc., R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420, in which case the seller of certain cars was prevented from performing his contract to deliver them by reason of delay on the part of the buyer in furnishing certain iron boxes for the cars. The cars were destroyed by accident while incomplete. The court refused to allow the maker of the cars to recover the value of the materials destroyed because the loss of them "was not the necessary consequence of the failure to deliver the boxes." The decision appar-

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ently amounts to a holding that the party in default is not liable for the loss unless his default necessarily and without doubt caused the loss of the goods. The Sales Act, on the other hand, would seem to put upon the party in default the burden of showing that under no circumstances could his default have caused the loss. The McConihe case seems to be affected by the act.

Rule in Other Jurisdictions.

A similar case is that of *Grant v. U. S.*, 7 Wall. 331, 19 U. S. (L. ed.) 194, in which case also the party in default was freed from bearing the loss because his default was not the proximate cause of the loss.

In the leading case of *Martineau v. Kitching*, L. R. 7 Q. B. (Eng.) 436, 456, the court expressed itself through Blackburn, J., as follows: "That is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the noncompletion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed."

CHAPTER VIII.

TRANSFER OF PROPERTY AS BETWEEN BUYER AND THIRD PERSON.

§ 104. SALE BY PERSON NOT THE OWNER.

1. Subject to the provisions of this article, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.¹

2. Nothing in this act, however, shall affect—

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.²

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Effect of Section. The section is declaratory of the pre-existing law.

English Act. Section 21 of the Sale of Goods Act is substantially the same as this section of the American act. In *Farquharson v. King*, [1902] A. C. 325, 86 L. T. N. S. 810, it was held that a servant of the owner of timber, stored at docks, who had authority to sign orders for the

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delivery of the timber, could not nevertheless convey good title to timber which he fraudulently transferred to a fictitious buyer and then, acting for that buyer, delivered to a *bona fide* purchaser for value without notice. He was a mere thief and could convey no title.

¹General Rule that None but Owner Can Sell. "Property in things movable can only pass from the owner by his own act and consent, except in those cases only where such owner has, by his own direct, voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as agent." *Brower v. Peabody*, 13 N. Y. 121, 126. "A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities in the title." *Farmers', etc., Nat. Bank v. Logan*, 74 N. Y. 568, 575. See *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 275, 32 Am. Dec. 541.

Effect of Possession.

It is conceded that "possession alone does not give the power to pass a valid title." *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Farmers', etc., Nat. Bank v. Logan*, 74 N. Y. 568, 586; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843.

Market Overt.

The custom of "market overt," in which any sale gave good title, has never existed in this state. *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Farmers', etc., Nat. Bank v. Logan*, 74 N. Y. 568.

Power of Shipmaster.

"The law of shipping is well known to the commercial world, to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity, the burden of proof rests on the purchaser, and the presumption is against it." *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 284, 285, 32 Am. Dec. 541.

Thief.

A thief can convey no title to ordinary chattels, even if the taker from him be a *bona fide* purchaser. *Bassett v. Spofford*, 45 N. Y. 387, 6 Am. Rep. 101; *Knox v. Eden Musee Americain Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L.R.A. 779, 51 Am. St. Rep. 700.

Mistake.

A person taking goods by mistake can convey no title to a *bona fide* purchaser. *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604.

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2 Estoppel. "Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person without his assent, under the rule now considered. 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and, 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*." *Barnard v. Campbell*, 55 N. Y. 456, 463, 14 Am. Rep. 289.

Illustrative Cases.

In the following cases it was held that the owner of the goods was not estopped to set up his title: *Sage v. Shepard, etc., Lumber Co.*, 4 App. Div. 291, 39 N. Y. S. 449, affirmed 158 N. Y. 672, 52 N. E. 1126 (purchase from known agent); *Smith v. Clews*, 114 N. Y. 190, 21 N. E. 160, 4 L.R.A. 392, 11 Am. St. Rep. 627 (possession for exhibition purposes only); *Hentz v. Miller*, 94 N. Y. 64 (false representations); *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289 (no reliance on possession); *Collins v. Ralli*, 20 Hun 246, affirmed 85 N. Y. 637 (property obtained by larceny).

In the following cases the owner was estopped from setting up his ownership as against a *bona fide* holder: *Parker v. Baxter*, 86 N. Y. 586 (ship's receipts placed in another's hands); *Dows v. Kidder*, 84 N. Y. 121 (owner entrusted another with documents of title); *Voorhis v. Olmstead*, 66 N. Y. 113 (possession of warehouse receipt); *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173 (owner assigned certificate of indebtedness); *McNeil v. New York Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341 (blank assignment of stock); *Rawls v. Deshler*, 3 Keyes (N. Y.) 572 (possession of bill of lading); *Western Transp. Co. v. Marshall*, 4 Abb. App. Dec. (N. Y.) 575 (bill of lading placed in another's power).

3 Statutory Regulation. Section 43 of the Personal Property Law (see appendix) contains a portion of the New York Factor's Act and the remainder is found in section 182 of the Lien Law. The latter statute is quoted here for the sake of completeness: "Section 182. *Factor's lien on merchandise.* A person, in whose name any merchandise shall be shipped, is deemed the true owner thereof so far as to entitle the consignee of such merchandise to a lien thereon: 1. For any money advanced or negotiable security given by such consignee, to or for the use of the person in whose name such shipment is made; and 2. For any money or negotiable security received by the person in whose

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name such shipment is made, to or for the use of such consignee. Such lien does not exist where the consignee has notice, by the bill of lading or otherwise, when or before money is advanced or security is given by him, or when or before such money or security is received by the person in whose name the shipment is made, that such person is not the actual and *bona fide* owner thereof."

Cases Under Factor's Act.

It is beyond the scope of this book to discuss the construction of the Factor's Act, but the following cases may be useful as showing to what extent that statute has affected the capacity of one not the owner to give good title to chattels: Cartwright v. Wilmerding, 24 N. Y. 521; Toledo First Nat. Bank v. Shaw, 61 N. Y. 283; Kinsey v. Leggett, 71 N. Y. 387; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; Schwab v. Oatman, 56 Misc. 393, 106 N. Y. S. 741; Stevens v. Wilson, 3 Den. (N. Y.) 472.

Conditional Sales.

The words "recording acts" in section 104 refer to the statutes relating to conditional sales. The statute requiring conditional sale contracts to be filed in order to be valid as against subsequent purchasers is found in section 62 of the Personal Property Law (see appendix). Obviously if the contract be not properly filed the vendee may give title to a *bona fide* purchaser, although as between himself and his seller he has no title. Thus an exception arises to the general doctrine of section 104.

The cases are numerous to the effect that a vendee under a conditional sale contract can give no title to a *bona fide* purchaser for value until he has paid for the goods. Ballard v. Burgett, 40 N. Y. 314; Austin v. Dye, 46 N. Y. 500; Campbell Printing Press, etc., Co. v. Walker, 114 N. Y. 7, 20 N. E. 625; Schryer v. Fenton, 15 App. Div. 158, 44 N. Y. S. 203; Nelson v. Gibson, 143 App. Div. 894, 129 N. Y. S. 702; Walker v. Mitchell, 25 Hun (N. Y.) 527; Puffer v. Reeve, 35 Hun (N. Y.) 480.

A few cases have held that, where delivery and payment were to be concurrent, delivery without the exaction of payment enabled the buyer to convey good title to a *bona fide* purchaser, apparently on the theory of waiver. Smith v. Lynes, 5 N. Y. 41; Wait v. Green, 36 N. Y. 556; Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626.

If the conditional vendee is expressly given a power to resell, obviously any sale made by him will be binding on the conditional vendor. Fitzgerald v. Fuller, 19 Hun (N. Y.) 180.

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§ 105. **SALE BY ONE HAVING A VOIDABLE TITLE.** Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.¹

Effect of Section. Section 105 expresses the common law, except that it affects sales by infants and lunatics. Formerly persons suffering from such incapacity have been allowed to disaffirm their sales and retake the goods sold, even though the goods had passed into the hands of an innocent purchaser for value. The Sales Act makes the title of an innocent purchaser for value from an infant's or lunatic's vendee good. See note below.

English Act. Section 23 of the Sale of Goods Act has been very closely followed in the drafting of the section. The following cases have been decided under the act: A buyer who procures the passing of the title to him through fraud has a voidable title and until it is avoided may transfer a good title to a *bona fide* purchaser for value without notice. *Truman v. Attenborough*, 103 L. T. N. S. 218. Where the owner of an article is induced to deliver it to another on sale or return, on the representation that the buyer has a customer to whom he wishes to sell it, the buyer obtains possession by fraud and does not commit larceny by trick, and hence, can, before the sale to him is avoided, give good title to a *bona fide* purchaser. *Whitehorn v. Davison*, [1911] 1 K. B. 463.

¹ **Effect of Sale by One Having Voidable Title.** *Fraud.* In *Saltus*

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v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 530, the court defines two classes of cases in which title may pass without the owner's consent and states (p. 279): "1. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss."

Illustrative Cases.

In the following cases the sale was voidable for fraud and the doctrine of the section was applied: *Paddon v. Taylor*, 44 N. Y. 371; *Cooper Mfg. Co. v. De Forest*, 5 App. Div. 43, 38 N. Y. S. 1038; *Benedict v. Williams*, 48 Hun 123, 15 N. Y. St. Rep. 677; *Levy v. Carr*, 85 Hun 289, 32 N. Y. S. 1023, affirmed 158 N. Y. 675, 52 N. E. 1124; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Craig v. Marsh*, 2 Daly (N. Y.) 61; *Lacker v. Rhoades*, 45 Barb. (N. Y.) 499; *Pearse v. Pettis*, 47 Barb. (N. Y.) 276.

Larceny by Trick.

A person representing himself to be the manager of a corporation and buying property for it, cannot give good title to a *bona fide* purchaser for value without notice, when there was no corporation and the representation was fraudulent. *Wyckoff v. Vicary*, 75 Hun 409, 27 N. Y. S. 103. In *McGoldrick v. Willits*, 52 N. Y. 612, one Roberts contracted to sell to the defendant five barrels of whiskey and then got the plaintiff to ship five barrels to defendant, on the representation that he was the agent of the defendant. The whiskey was shipped to the defendant and he paid Roberts therefor, although the name and business of the seller was marked upon the goods. It was held that the defendants acquired no title since the plaintiff had done no act to estop himself and Roberts had no voidable title to convey to the defendant.

Proceeds of Subsales.

Where a sale is induced by fraud the seller may reach the proceeds of subsales in the hands of the buyer's assignees for the benefit of creditors, when such proceeds can be identified. *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206, 27 L.R.A. 757.

Infants and Lunatics.

Although the cases on the subject are not numerous, the common law rule seems to be that an infant may avoid a contract of sale even against an innocent purchaser from his vendee, and recover the goods from such innocent purchaser. *Miles v. Lingerman*, 24 Ind. 385; *Myers v. Sanders*, 7 Dana (Ky.) 506, 521; *Hill v. Anderson*, 5 Smed.

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& M. (Miss.) 216; *Downing v. Stone*, 47 Mo. App. 144; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209. The Sales Act makes a sale by a vendee of an infant to an innocent purchaser convey good title to such purchaser.

The draftsman of the act says of this change (*Williston on Sales*, p. 563): "This has been the privilege of the infant, and in jurisdictions where the contract of a lunatic is regarded as analogous to that of an infant, the same principle has been applied. In regard to such cases this section of the Sales Act works a change in the law. It is desirable that at some time the title to goods bought from an infant or lunatic should be perfected, and the advantages to trade and the stability of titles justifies the diminution in the privilege of infants and lunatics."

Who Is a Buyer "For Value"?

One who has paid part of the purchase price prior to receiving notice of a defect in his vendor's title is *pro tanto* a buyer for value. *Sargent v. Eureka Spund Apparatus Co.*, 46 Hun 19, 11 N. Y. St. Rep. 68. A donee is obviously not a taker for value. *Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117. But one surrendering a past due promissory note in return for goods is a taker for value. *Paddon v. Taylor*, 44 N. Y. 371; *Powers v. Freeman*, 2 Lans. (N. Y.) 127. Neither an execution creditor buying upon a sale under his execution nor a judgment creditor levying upon goods is a buyer for value. *Devoe v. Brandt*, 53 N. Y. 462; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun (N. Y.) 481.

Antecedent Debt as Value.

The Uniform Sales Act defines "value" as follows: "'Value' is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor." The New York legislature omitted this definition from the Sales Act when they adopted it (see sec. 156, post). Consequently the rule still prevails in this state that the taker of goods in payment of or as security for an antecedent debt is not a buyer for value. *Weaver v. Barden*, 49 N. Y. 286; *Stevens v. Brennan*, 79 N. Y. 254, 258; *Van Slyck v. Newton*, 10 Hun (N. Y.) 554; *Rochester Distilling Co. v. Devendorf*, 72 Hun 428, 25 N. Y. S. 200; *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; *Woodburn v. Chamberlin*, 17 Barb. (N. Y.) 446; *Victoria Paper Mills Co. v. New York Co.*, 27 Misc. 179, 57 N. Y. S. 397; *Beavers v. Lane*, 6 Duer (N. Y.) 232; *Partridge v. Rubin*, 15 Daly 344, 6 N. Y. S. 657.

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Notice.

Purchasers from a fraudulent vendee who have notice of the fraud obtain no title against the true owners. *Gowing v. Warner*, 29 Misc. 593, 61 N. Y. S. 500, affirmed 30 Misc. 593, 62 N. Y. S. 797. The burden is on the purchaser from the fraudulent buyer to prove that he is a *bona fide* purchaser without notice. *Devoe v. Brandt*, 53 N. Y. 462. As to what facts show notice or reason to put the buyer on inquiry, see *Anderson v. Nicholas*, 28 N. Y. 600; *Dudley v. Gould*, 6 Hun (N. Y.) 97; *Danforth v. Dart*, 4 Duer (N. Y.) 101; *Mitchell v. Worden*, 20 Barb. (N. Y.) 253. The rule relating to notice in case of sales of real property is different. *Cambridge Valley Bank v. Delano*, 48 N. Y. 326.

"A purchaser with notice will secure a good title by obtaining it from a party who had no notice, and may hold the property bought against the equities of a party otherwise entitled to be regarded as the true owner." *Williamson v. Mason*, 12 Hun (N. Y.) 97, 108.

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Sale by Seller in Possession.

§ 106. **SALE BY SELLER IN POSSESSION OF GOODS ALREADY SOLD.** Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.¹

Effect of Section. The section is a partial substitute for the former section 36 of the Personal Property Law, repealed by the Sales Act. It changes the law by making the presumption in favor of the second buyer conclusive, instead of merely presumptive. See note below. "This section follows section 25 (1) of the English Act. It is comparatively new to the English law, being first enacted in the Factor's Act of 1889. But, so far as purchasers are concerned, it states in effect the principle commonly laid down in this country, that delivery is not necessary between the parties, but is as against third persons. The rights of creditors are dealt with in the next section. Section 25 (2) of the English Act provides that a buyer in possession without title shall have power to transfer title. This is contrary to American law and has been omitted. Mechem, § 599." (Notes of Commissioners on Uniform State Laws, 30 Am. Bar Assoc. Rep. 361, 362`

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English Act. See next preceding note. Apparently the only case decided under the Sale of Goods Act in England with respect to this section is *Nicholson v. Harper*, [1895] 2 Ch. 415, 73 L. T. N. S. 19. In that case the owner of wine stored in a cellar, sold it to the plaintiff and agreed to keep it for him in the cellar for a year. The seller then pledged it for advances to the keeper of the warehouse where it was stored. The position of the goods was not changed nor was any document of title given to the warehousekeeper. Held, that under section 25 of the Sale of Goods Act (sec. 106, Pers. Prop. Law) the warehouseman had not acquired a title superior to the original buyer. "What is necessary to establish title is that a person, in the position which Goldsmith [the seller] is in here, should make an actual delivery of the goods or a transfer of the documents of title to some person without notice. Either a delivery or a transfer is necessary. The defendants [warehousemen] were in possession long before sale, and continued in possession. The words of the section mean a delivery of goods, or where the goods are not delivered a handing over of the documents of title, which are certain well-known mercantile documents." 73 L. T. N. S. 19, 20).

¹ **Sale by Seller in Possession of Goods Already Sold.** "As between buyer and seller, the title passes without delivery, if such was their intention." *Burt v. Dutcher*, 34 N. Y. 493, 496; *Sturtevant v. Ballard*, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281.

Delivery Necessary as Against Subsequent Purchaser.

The question is, Is delivery necessary as against subsequent purchasers of the goods? The leading case upholding the doctrine of the section is *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119. In that action there had been a sale of goods at sea, and upon their arrival they were seized by a creditor of the seller under an attachment. The holding was that the attaching creditor obtained a right to the goods because of the lack of delivery to the first buyer. The court said

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(p. 113): "Delivery of possession is necessary in a conveyance of personal chattels as against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other." This doctrine has been sustained in *Burnell v. Robertson*, 10 Ill. 282; *Huschle v. Morris*, 131 Ill. 587, 23 N. E. 643; *Reed v. Reed*, 70 Me. 504; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389; *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433; *Crawford v. Forristall*, 58 N. H. 114.

The doctrine of the section is supported by the following authorities: *Benjamin on Sales* (7th ed.), p. 731; *Mechem on Sales*, sec. 979 et seq.; *Tiffany on Sales*, p. 204 et seq.; 35 Cyc. 304; 24 Am. & Eng. Enc. of Law (2d ed.) 1164.

What Is Delivery?

As to what constitutes delivery under the doctrine of *Lanfeur v. Sumner*, supra, see the following cases: *Hardy v. Potter*, 10 Gray (Mass.) 89; *Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; *Ingalls v. Herrick*, 108 Mass. 351, 11 Am. Rep. 360.

Former Statutory Rule in New York.

The question involved in this section was governed by statute in New York prior to the adoption of the Sales Act. Section 36 of the Personal Property Law provided as follows:

"§ 36. *Sales and charges other than chattel mortgages without delivery and change of possession.* Every sale of goods and chattels in the possession or under the control of the vendor, and every assignment of goods and chattels by way of security or on any condition, but not constituting a mortgage nor intended to operate as a mortgage, unless accompanied by an immediate delivery followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor or person making the sale or assignment, including all persons who are his creditors at any time while such goods or chattels remain in his possession or under his control or subsequent purchasers of such goods and chattels in good faith; and is conclusive evidence of such fraud, unless it appear, on the part of the person claiming, under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers."

"But this section does not apply to a contract of bottomry or respondentia, or to an assignment of a vessel or goods at sea or in a foreign port."

That section was repealed by the statute which enacted the Sales Act (Laws 1911, ch. 571, § 2). Thus instead of a *prima facie* pre-

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Sale by Seller in Possession.

sumption that the first sale without delivery and change of possession is void as against a second buyer, the Sales Act substitutes a conclusive presumption. The true owner is conclusively estopped to deny that the seller in possession was not his agent to sell to the second purchaser.

Sections 106 and 107 of the present Personal Property Law take the place of the former section 36, and a further discussion of the effect of the repeal of that section is given under section 107, post.

For cases construing the old section 36, in so far as it concerned subsequent purchasers in good faith, see *Tallman v. Kearney*, 3 *Thomp. & C.* (N. Y.) 412; *Brown v. Wilmerding*, 5 *Duer* (N. Y.) 220; dictum, *Clute v. Fitch*, 25 *Barb.* (N. Y.) 428.

§ 107. Creditor's Rights against Sold Goods.

§ 107. CREDITORS' RIGHTS AGAINST SOLD GOODS IN SELLER'S POSSESSION. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.¹

Effect of Section. This section and section 106 together take the place of the former section 36 of the Personal Property Law, which was repealed by the Sales Act (Laws of 1911, ch. 571, § 2). Section 36 made sales without immediate delivery and change of possession presumptively fraudulent and void as against creditors of the seller, that is, it created a rebuttable presumption of law. The present section 107 makes such sales fraudulent only when so *in fact*, or under any rule of law. It is submitted that the only statutory "rule of law" upon the subject in New York was abolished by the repeal of section 36, so that now the situation is the same as before the enactment of the Revised Statutes in 1830 when the rule of section 36 was first made statutory. The cases decided before 1830 show that the statute of which section 36 was the successor was merely declaratory of the common law, and that at common law the sale was *prima facie* fraudulent. Apparently, therefore, the law has not been changed, so far as creditors are concerned, by the repeal of section 36 and the substitution of section 107. See notes below. "The law in this country as to the effect of retention of possession on the rights of creditors is in such conflict and

the different rules are locally so firmly fixed that it seemed unwise to try to provide a uniform rule. All states, however, agree that if the retention is fraudulent in fact, the sale is void as to creditors. The draft, therefore, so provides, and as to other cases—cases of constructive fraud—adopts the locally prevailing rule.” (Notes of Commissioners, American Uniform Commercial Acts, p. 88).

English Act. The Sale of Goods Act has no corresponding section, but the doctrine stated here is recognized in the English law and had its origin there in the statute of 13 Eliz. c. 5.

¹Creditor's Rights against Sold Goods in Seller's Possession. As suggested above, it is believed that, by virtue of the repeal of former section 36 of the Personal Property Law (for the text of which see note to section 106, ante) it is now useful to look to the common law cases, decided before 1830, to ascertain the “rule of law” concerning the presumption of fraud under the situation here presented.

Early Cases.

The earliest authoritative case upon the subject is *Sturtevant v. Ballard*, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281 (1812), in which Kent, C. J., expressed the rule as follows (p. 344): “We may, therefore, safely conclude that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors.” This apparently made the presumption of fraud conclusive. But in *Bissell v. Hopkins*, 3 Cow. (N. Y.) 166, 15 Am. Dec. 259 (1824), the court said (p. 188) that “possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained. The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors;” * * *. And in *Hall v. Tuttle*, 8 Wend. (N. Y.) 375 (1832), the court, in considering the situation existing before the enactment of the statutory rule in 1830, said (pp. 379–380): “If I am right in supposing that the rule laid down in *Sturtevant v. Ballard* amounts to no more than that possession remaining in the vendor is *prima facie* evidence of fraud, then there is no discrepancy between the cases in this court;

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they all maintain the same doctrine, and such substantially was the law stated to the jury in this case; and so have the legislature pronounced the law to be, from and after Jan. 1, 1830 [statute quoted]. This legislative enactment contains what I understand the law to have been ever since the 13 Eliz., ch. 5, and what the common law was before that statute was enacted." For other cases discussing sales made prior to the passage of the statute, see *Barrow v. Paxton*, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354 (1810); *Butts v. Swartwood*, 2 Cow. (N. Y.) 431 (1823); *Jennings v. Carter*, 2 Wend. (N. Y.) 446, 20 Am. Dec. 635 (1829); *Archer v. Hubbell*, 4 Wend. (N. Y.) 514 (1830); *Collins v. Brush*, 9 Wend. (N. Y.) 198 (1832).

What Is a Change of Possession?

After the passage of the statute which went into effect in 1830, the rule was held to be that implied from a plain reading of the statute, namely, "that the sale must be followed by a continued change of possession, or it shall be presumed to be fraudulent." *Tilson v. Terwilliger*, 56 N. Y. 273, 276; *Mitchell v. West*, 55 N. Y. 107; *Blaut v. Gabler*, 77 N. Y. 461; *Siedenbach v. Riley*, 111 N. Y. 560, 19 N. E. 275.

Where the seller is out of possession for two or three weeks and then is employed as manager and comes into possession again, it is a question of fact for the jury to determine whether the sale was fraudulent. *Menken v. Baker*, 40 App. Div. 609, 57 N. Y. S. 541, affirmed 166 N. Y. 628, 60 N. E. 1116.

Illustrative Cases.

In the following cases the sale was held to be fraudulent: *Tilson v. Terwilliger*, 56 N. Y. 273 (delivery to buyer followed by redelivery to seller); *Gardenier v. Tubbs*, 21 Wend. (N. Y.) 169 (removal by buyer at considerable interval after sale); *Butler v. Stoddard*, 7 Paige (N. Y.) 163 (constructive change by seller becoming bailee for buyer).

In the following cases the sale was held to have been made in good faith and to be valid: *Prentiss Tool Co. v. Schirmer*, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737 (goods left in seller's possession to do work upon them); *Mitchell v. West*, 55 N. Y. 107; *Fisher v. Stout*, 74 App. Div. 97, 77 N. Y. S. 945 (seller left in control as agent); *Knight v. Forward*, 63 Barb. (N. Y.) 311 (brief use of property by seller); *Spotten v. Keeler*, 22 Abb. N. Cas. (N. Y.) 105, 12 N. Y. St. Rep. 385 (concurrent possession by buyer and seller).

Bulky Goods.

"Undoubtedly the bulky and cumbersome character of articles sold affects the nature of acts of delivery and taking possession. But some act, definite and distinct, is always required. Actual removal from

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the mill might not have been necessary, but something tantamount to an actual delivery, some plain surrender of possession on the one hand and assumption of it on the other, is necessary, and the finding of the Special Term negatives the existence of any such fact." *Stimson v. Wrigley*, 86 N. Y. 332, 337, 338.

In connection with section 107 see sections 35 and 37 of the Personal Property Law (appendix), and section 230 of the Lien Law, as amended by chapter 326 of the Laws of 1911.

CHAPTER IX.

DOCUMENTS OF TITLE.

§ 108. **DEFINITION OF NEGOTIABLE DOCUMENTS OF TITLE.** A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.¹

Effect of Section. This section cannot be said to have any effect on the common law of New York because it defines a term unknown to that law. The phrase "document of title" is taken from the English law. The division of the Sales Act of which this section is the initial section, however, alters very materially the common law theory regarding bills of lading, warehouse receipts and other instruments included within the meaning of the term "documents of title." This change has come about through the very wide degree of negotiability given to such documents by the Sales Act and kindred legislation. See notes to sections 108-121 inclusive.

English Act. The Sale of Goods Act has no corresponding section. The subject of "documents of title" is not treated in that act, though the term is mentioned.

¹ **Definition of Negotiable Documents of Title.** The phrase "document of title" is taken from the English Sale of Goods Act, in which

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it is referred to, but not treated as in the Sales Act, sections 108-121. The phrase was also used in the English Factor's Act of 1889. It seems to be comparatively unknown to the common law of New York.

For a definition of "document of title" under the Sales Act, see section 156, post. The requirement that the document be made to order or bearer in order to be negotiable is similar to the standard of negotiability set for negotiable instruments (Neg. Inst. Law, sec. 20, subd. 4), for warehouse receipts (Gen. Bus. Law, sec. 92), and for bills of lading (Pers. Prop. Law, sec. 191), and is believed to coincide with the common law definition of negotiability. That term is taken to mean the quality of assignability free from outstanding equities.

Purpose of Chapter.

The Sales Act has previously dealt with the effect of various methods of treating bills of lading, in connection with the passage of the property to the goods from seller to buyer (see sec. 101, ante). It remains in sections 108-121 to consider the effect of the delivery, transfer and indorsement of bills of lading, warehouse receipts and other documents of title where the rights of others than the original buyer and seller are concerned.

Documents of title may be considered as (1) receipts for goods delivered, (2) contracts for the redelivery or carriage of those goods, (3) representatives of the goods for the purpose of the transfer of title. It is the latter aspect in which they are discussed in sections 108 to 121 of the Sales Act.

Widening of Negotiability Through Uniform Commercial Acts.

Sections 108 to 121 are a part of a general scheme adopted by the Commissioners on Uniform State Laws to widen the negotiability of commercial documents. The same theory is followed out in the Uniform Warehouse Receipts Law which is found in sections 90 to 143 of the General Business Law (L. 1907, ch. 732), and in the Uniform Bills of Lading Act which has been incorporated into the Personal Property Law as sections 187 to 241 (L. 1911, ch. 248; see appendix). Since the phrase "documents of title" includes both warehouse receipts and bills of lading, the provisions of the Sales Act somewhat overlap those of the Warehouse Receipts Law and Bills of Lading Act.

The effect of these three commercial acts upon documents of title is illustrated by a statement of the draftsman of the Sales Act: "The theory upon which property may be transferred by such documents has not been altogether clear. The view which probably has the support of the greater number of decisions is that the document represents the goods, and the delivery of the document is, in

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effect, a delivery of the goods. What may be called the mercantile view, however, treats the document as analogous to a bill of exchange, or promissory note, of which the bailee is the drawee or maker; and the rights of a holder of the document are, under this view, to be determined according to the terms of the instrument. In the decision of most cases it will make no difference which of these views is adopted; but as the ensuing discussion will show, there are cases where the distinction is vital. In the provisions of this act, the mercantile view is consistently carried out." (Williston on Sales, p. 694). This change from the common law theory of documents of title to the mercantile or negotiable instrument view is developed in sections 108 to 121 of the act.

Common Law View of Documents.

The early common law theory of a bill of lading as merely evidence of a contract is shown in the following quotations: "A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by water, for a certain freight." *Covill v. Hill*, 4 Den. 323, 330, reversed on another point, 1 N. Y. 522. "The bill of lading is the written evidence of the contract between the owner of the goods and the master or owner of the vessel for the carriage and delivery of the goods at a certain freight, when sent by sea or other public waters." *Creery v. Holly*, 14 Wend. (N. Y.) 26, 28.

§ 109.

Negotiation by Delivery.

§ 109. NEGOTIATION OF NEGOTIABLE DOCUMENTS BY DELIVERY. A negotiable document of title may be negotiated by delivery—

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.¹

Effect of Section. The common law did not recognize the negotiation which this section provides for. It made provision for passing the property in the goods represented by the document by means of delivery, but did not provide for negotiation in the sense that prior equities could be cut off. See note below.

English Act. The Sale of Goods Act has no corresponding section.

¹ **Negotiation of Negotiable Documents by Delivery.** "The delivery of a bill of lading with intent to pass the title has that effect, although it be not payable to 'assigns,' or although if so payable, it be

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not indorsed." *City Bank v. Rome R. Co.*, 44 N. Y. 136, 139. In *Rochester Bank v. Jones*, 4 N. Y. 497, 507, 55 Am. Dec. 290, it was held that "the delivery of an unindorsed bill of lading is a good symbolical delivery, so as to vest the property in the vendee or pledgee." See also *Merchants' Bank v. Union R., etc., Co.*, 69 N. Y. 373, 379; *Becker v. Hallgarten*, 86 N. Y. 167; *Syracuse First Nat. Bank v. New York Cent., etc., R. Co.*, 85 Hun 160, 32 N. Y. S. 604; *Matter of Non-Magnetic Watch Co.*, 89 Hun 196, 34 N. Y. S. 1017.

It is apparent from these cases that the common law allowed the property in the goods represented by the document to be transferred by a mere delivery of the document, even though it was not in a form which the Sales Act calls "negotiable," that is, payable to order and indorsed, or payable to bearer.

The Document a Symbol of the Goods.

In *Friedlander v. Texas, etc., R. Co.*, 130 U. S. 416, 424, 9 S. Ct. 570, 32 U. S. (L. ed.) 991, the Supreme Court, after referring to bills of exchange and promissory notes, says: "But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence." See also *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 557, 25 U. S. (L. ed.) 892.

"A bill of lading to bearer, or even in blank, delivered by the shipper, for value, would be sufficient to enable the holder to receive and hold the property, against any person except a prior indorsee without notice." *Allen v. Williams*, 12 Pick. (Mass.) 297, 301. Where a bill of lading is indorsed in blank, title to the goods passes by delivery of the bill. *Munroe v. Philadelphia Warehouse Co.*, 75 Fed. 545.

Analogous Statutory Provisions.

For provisions covering the same subject in relation to negotiable instruments, see *Neg. Inst. Law*, secs. 28, 60, 70; *warehouse receipts*, *Gen. Bus. Law*, sec. 122; *bills of lading*, *Pers. Prop. Law*, sec. 214 (see appendix).

§ 110. NEGOTIATION OF NEGOTIABLE DOCUMENTS BY INDORSEMENT. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.¹

Effect of Section. It is again to be noted that "negotiation" of bills of lading and other documents of title, in the proper sense of the word, did not exist at common law. This section, in that it is part of a scheme for building up this quality of negotiability, modifies the common law.

English Act. The Sale of Goods Act contains no corresponding section.

¹**Negotiation of Negotiable Documents by Indorsement.** At common law a document could be transferred so as to pass the transferor's title by mere delivery, even though the document were an order document and unindorsed. See cases cited under section 109, ante. *A priori* at common law if the document were indorsed by the person to whose order it ran, the title of the indorser would pass to the taker.

Document a Symbol.

"Another exception [to the rule that no one but the owner can convey good title] is in the case of a transfer by indorsement and delivery of a bill of lading, which is the symbol of the property itself, to a *bona fide* purchaser for value, by a consignee to whom the consignor and original owner of the goods has indorsed and delivered it. This exception is founded on the nature of the instrument, and the necessities of commerce. The bill of lading, for the convenience of

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Negotiation by Indorsement.

trade, has been allowed to have effect at variance with the general rule of law. But this operation of a bill of lading is confined to a case where the person who transfers the right is himself in possession of the bill of lading so as to be in a situation to transfer the instrument itself, the symbol of the property transferred." *Barnard v. Campbell*, 55 N. Y. 456, 461, 462, 14 Am. Rep. 289.

Intent to Pass Title Necessary.

Property in negotiable documents of title passes by indorsement and delivery only when the owner intended it to pass. Mere indorsement or mere delivery is not sufficient. *The Carlos F. Roses*, 177 U. S. 655, 20 S. Ct. 803, 44 U. S. (L. ed.) 929.

Sections 109 and 110 Exclusive?

The section does not expressly purport to exclude negotiation of order documents otherwise than by indorsement, when they are not negotiable under section 109. But apparently the intent of the act is that sections 109 and 110 shall provide the only ways of negotiating documents of title. If they are merely delivered to another when they require indorsement the transaction amounts merely to a "transfer" (section 112). The rights of a transferee are shown in section 115. A transferee of an order document which lacks an indorsement secures a right to compel that indorsement (section 116).

Analogous Statutory Provisions.

The analogy between the provisions here made and those of the Negotiable Instruments Law is close. See *Neg. Inst. Law*, sec. 60. For corresponding provisions, see *Gen. Bus. Law*, sec. 122; *Pers. Prop. Law*, sec. 215 (see appendix).

§ 111. **NEGOTIABLE DOCUMENTS OF TITLE MARKED "NOT NEGOTIABLE."** If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.¹

Effect of Section. The section apparently changes the common law rule that marking a bill of lading "not negotiable" rendered it actually not transferrable, even though it were an order or a bearer bill. See note below. The section expressly negatives any intent to affect the effect of such words on the liability of the carrier as defined in section 365 of the Penal Law.

English Act. The Sale of Goods Act contains no such section.

¹**Negotiable Documents of Title Marked "Not Negotiable."** Placing such words on a document raises two questions. The first is, How is the liability of the carrier affected? The second is, How is the negotiability of the document affected?

Duty of Carrier to Take Up Document.

The first question has been answered by statute in this state. Sec-

§ 111. Documents Marked "Not Negotiable."

tion 365 of the Penal Law provides that one issuing a document of title is punishable by fine or imprisonment unless he requires its surrender at the time he delivers the goods, unless the document is marked upon its face "not negotiable." Marking the document with these words thus relieves the carrier of this criminal liability. That section 111 is intended to have no effect on the use of the words for the purpose of avoiding this criminal liability is apparent from the last sentence of the section.

For cases construing this section of the Penal Law, or its predecessor, see *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. 114; *Mairs v. Baltimore, etc., R. Co.*, 175 N. Y. 409, 67 N. E. 901; *Syracuse First Nat. Bank v. New York Cent., etc., R. Co.*, 85 Hun 160, 32 N. Y. S. 604.

Views of Draftsman and Commissioners.

The draftsman of the act says regarding this section: "This section of the Sales Act, therefore, in effect, merely nullifies, so far as concerns negotiations, the words 'not negotiable' when put upon a document of title running to 'order' or 'bearer,' but does not concern itself with the effect of those words upon the obligation of the bailee issuing the document." (Williston on Sales, p. 705).

The Commissioners on Uniform State Laws append the following note to this section: "It has been until recently the custom of the railroads to stamp upon bills of lading, even though running to order or assigns, the words "not negotiable." How far the carrier is justified in attempting to limit its liability by such a device may be questioned, but as this act is concerned not with the liability of the carrier but with the rights of the various holders of the bill of lading as against each other, it seemed wise to provide merely that as between those parties the words 'not negotiable' do not change the legal effect of the document." (American Uniform Commercial Acts, p. 90).

New York View that Negotiability Was Destroyed.

It is obvious that making a document to order or bearer and marking it "not negotiable" are inconsistent acts. One must offset the other. In *Gass v. Astoria Veneer Mills*, 134 App. Div. 184, 190, 118 N. Y. S. 982, the court made the following statements: "Unless, therefore, the words 'not negotiable' affect the power of the consignee named in such bill of lading to transfer a valid title to a purchaser of the goods from him, free from any claim on the part of the true owner thereof, it is difficult to see what effect can be given to the said words. * * * We think, therefore, that the transferee of a bill of lading, stamped upon its face 'not negotiable' cannot avail

§ 111.

Documents Marked "Not Negotiable."

himself of the beneficial provision of the Factor's Act above referred to, but is left to such rights thereunder as he might have had at common law. * * * We think it is too narrow a construction to hold that the words 'not negotiable' are intended simply to limit the responsibility of the carrier. * * * We think that by the use of these words it was also intended to give notice to such purchasers of the possible rights of the consignor." See also *Batavia Bank v. New York, etc., R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440.

The effect suggested in the *Gass* case, *supra*, that negotiability is destroyed, is repudiated in this section of the Sales Act and in this respect the Sales Act apparently modifies the law.

Analogous Statutory Provisions.

For similar provisions concerning warehouse receipts see *Gen. Bus. Law*, sec. 94, and concerning bills of lading, *Pers. Prop. Law*, sec. 194 (see appendix).

§ 112. Transfer of Non-Negotiable Documents.

§ 112. **TRANSFER OF NON-NEGOTIABLE DOCUMENTS.** A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.¹

Effect of Section. The common law did not distinguish between transfer and negotiation, but it allowed non-negotiable documents to be assigned with fully as much freedom as this section of the Sales Act. See note below.

English Act. The Sale of Goods Act has no corresponding section.

¹**Transfer of Non-Negotiable Documents.** The Commissioners on Uniform State Laws annotate this section as follows: "The distinction between warehouse receipts and bills of lading negotiable in form and those which are not does not seem to be observed in the English decisions; but it is observed in this country both in the usages of warehousemen and carriers and in the decisions of the courts. See *Hallgarten v. Oldham*, 135 Mass. 1; *Gill v. Frank*, 12 Ore. 507; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154; *Litchfield Bank v. Elliott*, 83 Minn. 469." (American Uniform Commercial Acts, p. 91).

The section covers two kinds of documents, namely, (1) negotiable documents not properly indorsed, and (2) strictly non-negotiable documents. A transferee of the first kind of document may obtain an indorsement (sec. 116, post).

Common Law View of Non-Negotiable Documents.

At common law the delivery of a non-negotiable bill passed the title to the goods thereby represented. *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 125, 6 N. E. 114; *Hoyt v. Hartford F. Ins. Co.*, 26 Hun 416, affirmed 96 N. Y. 650.

§ 112. Transfer of Non-Negotiable Documents.

And so accurately was the bill of lading deemed to represent the goods at common law, that the seller of goods was allowed to pass title to the goods by delivery of a non-negotiable bill of lading by which the goods were deliverable to the buyer. A transfer of a bill by one not technically the holder seemed to pass title. *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Marine Bank v. Wright*, 48 N. Y. 1; *Cincinnati First Nat. Bank v. Kelly*, 57 N. Y. 34; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311; *Batavia First Nat. Bank v. Ege*, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 131; *Matter of Non-Magnetic Watch Co.*, 89 Hun 196, 34 N. Y. S. 1017.

Analogous Statutory Provisions.

For similar sections relating to warehouse receipts and bills of lading, see Gen. Bus. Law, sec. 123, and Pers. Prop. Law, sec. 216 (see appendix).

§ 113.

Who May Negotiate a Document.

§ 113. WHO MAY NEGOTIATE A DOCUMENT. A negotiable document of title may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.¹

Effect of Section. This section modifies the common law by giving documents of title a wider negotiability than they possessed at common law. See note below.

English Act. The Sale of Goods Act has no corresponding section.

¹ **Who May Negotiate a Document.** This section should be read in connection with section 119, post.

Common Law View of Negotiability.

At common law documents of title had no negotiability. "The receipts, although recognized as *prima facie* evidence of property in the thing receipted, in those who have them in possession, do not, it is presumed, enter into the currency, and like bank notes become the property of a *bona fide* holder." *Brower v. Peabody*, 13 N. Y. 121, 126. "Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and even possession of a bill of lading, without the authority of the owner and vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit." *Barnard v. Campbell*, 55 N. Y. 456, 462, 14 Am. Rep. 289. See also *Shaw v. North Penn-*

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sylvania R. Co., 101 U. S. 557, 25 U. S. (L. ed.) 892; Dows v. Perrin, 16 N. Y. 325, 333.

"What has been called the common-law view, however, which treats delivery of the documents of title, whatever its form, as merely equivalent to the delivery of the goods, leads to a different result. For as mere delivery of possession of the goods themselves does not enable the person intrusted to transfer ownership, so it is held delivery of the document of title can have no greater result." (Williston on Sales, p. 747).

Thief and Finder Excluded.

This section of the act allows one who has been intrusted with the document to give good title to it, if it runs to his order or is negotiable by delivery, that is, is indorsed in blank or runs to bearer. This degree of negotiability would not include cases of a thief or finder, and if this were the only legislation on the subject, there would be no doubt that one finding or stealing a bill of lading or warehouse receipt could not give good title to it as against the true owner. As to warehouse receipts, there is no doubt that such is the law, for this section of the Sales Act simply re-enacts section 124 of the Gen. Bus. Law, in so far as warehouse receipts are concerned.

Bills of Lading Act and Sales Act Inconsistent.

But as to bills of lading the situation is different. The Commissioners on Uniform State Laws make the following note concerning this section: "By this section a negotiable document of title is not given the full negotiability of a bill of exchange, inasmuch as neither a thief nor a finder is within the terms of the section. By the Uniform Bills of Lading Act, however, the Commissioners on Uniform State Laws adopted the principle of full negotiability. In a jurisdiction where it is desired that the Sales Act and the Bills of Lading Act should both be passed and should be in harmony, the following substitute is suggested for section 32 of the Sales Act as above printed: Section 32. (Who may Negotiate a document). A negotiable document may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the document, the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery."

The legislature of 1911 passed both the Bills of Lading Act and the Sales Act. The former became a law June 6, 1911, the latter, June 30, 1911. The Bills of Lading Act (sec. 217, Pers. Prop. Law; see appendix) enacted a section having the exact effect of the substituted section given in the paragraph above, and thus gave bills of lading ab-

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solute negotiability. But the legislature did not accept the suggestion of the Commissioners on Uniform State Laws and change section 113 of the Sales Act so as to make it consistent with the Bills of Lading Act. The result is that we have the Bills of Lading Act declaring bills of lading absolutely negotiable and the Sales Act declaring all documents of title (which, of course, includes bills of lading) of limited negotiability and excluding the cases of finder and thief. Which act is to control the subject of the negotiability of bills of lading?

Bills of Lading Probably Absolutely Negotiable.

It seems probable for several reasons that the Bills of Lading Act will control and that bills of lading will have absolute negotiability. As previously noted, the Bills of Lading Act became a law June 6, 1911, and the Sales Act, June 30, 1911. Section 158 of the Sales Act provides that "Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the law to make uniform the law of warehouse receipts, or of the law, if enacted, to make uniform the law of bills of lading." This express saving clause would seem to prevent a repeal of section 217 of the Personal Property Law by section 113 of the same law.

"Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session." *Smith v. People*, 47 N. Y. 330, 339. It would seem that these two acts could both be sustained by restricting the effect of the Sales Act (sec. 113) to documents of title other than bills of lading.

"It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it." *Buffalo Cemetery Assoc. v. Buffalo*, 118 N. Y. 61, 66, 22 N. E. 962. The Bills of Lading Act is special, covering only one kind of documents of title, while the Sales Act is general, purporting to cover all documents of title.

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§ 114. **RIGHTS OF PERSON TO WHOM DOCUMENT HAS BEEN NEGOTIATED.** A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.¹

Effect of Section. This section follows out the general scheme of the Sales Act in giving documents of title negotiability and, therefore, increases the rights of the taker of an order or bearer document. See note below for a discussion of the change.

English Act. The Sale of Goods Act does not deal with documents of title and, therefore, has no corresponding section.

¹**Rights of Person to Whom Document has been Negotiated.** Concerning this section the Commissioners on Uniform State Laws make the following statement: "This section follows the custom of merchants. It makes the document represent the depositor's right in the goods, so that a purchaser of the document, if he acquires a good title thereto, acquires not simply the rights of his vendor, but whatever property the original depositor had, that being what the document

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represented. 32 (b) [P. P. L., § 114 (b)] makes the obligation of the warehouseman in regard to the goods negotiable. Many states already have statutes making warehouse receipts negotiable. Mohun on Warehousemen, 944; and some states have statutes in regard to bills of lading, *ibid.* 848, but these statutes have generally been so brief and general in terms that they have been variously construed and have to some extent failed of their purpose. See *Shaw vs. North Pennsylvania R. Co.*, 101 U. S. 557. This section and the preceding are of fundamental importance to merchants and bankers. They state familiar law in regard to bills and notes and there is authority for them both in the statutes making warehouse receipts and bills of lading negotiable, and also in common law decisions. *Pollard vs. Reardon*, 65 Fed. Rep. 848 (C. C. A.); *Munroe vs. Philadelphia Warehouse Co.*, 75 Fed. Rep. 545. See also *Commercial Bank vs. Armsby Co.*, 120 Ga. 74. But the language at least of other cases would seem to indicate the theory that the form of a document of title, though negotiable, is only evidence of intention and that other evidence is admissible to show intention, to transfer or retain title even as against innocent third persons. See *The Carlos F. Roses*, 177 U. S. 655, 665; *Washburn Crosby Co. vs. Boston & Albany R. Co.*, 180 Mass. 252, 257; *Neimeyer Lumber Co. vs. Burlington, etc. & Mo. R. Co.*, 54 Neb. 321." (30 Am. Bar Assoc. Rep. 365, 366).

The draftsman of the act puts the query as to what is the title transferred by negotiation of negotiable documents and gives the following answer: "The answer to this question, according to what may be called the common-law theory of documents of title, is that the indorsee acquires such title by means of the document as the indorser could have given him by delivery of the goods. That the indorsee, unless the indorser manifests a contrary intention, acquires as much right as this is clear." (Williston on Sales, p. 731).

Common Law View.

The common law theory in this state is well expressed in *Gass v. Astoria Veneer Mills*, 134 App. Div. 184, 185, 187, 118 N. Y. S. 982, as follows: "A bill of lading in the first instance represents the contract between the shipper and the carrier, by which, for a specified sum the latter undertakes to deliver the goods received by it to the rightful owner thereof, and to no other person. (*McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34). The consignee named in the bill of lading is presumptively the owner of the goods, and entitled upon complying with the terms of the contract of carriage, to demand possession of the same (1 Hutch. Carr. (3d ed.) § 177; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70) and a delivery to a consignee or by his direction is a good delivery. (*Sweet v. Barney*, 23 N. Y. 335).

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A bill of lading also stands for many purposes as the representative of the goods shipped, and at common law the title to the goods while they were in the possession of the carrier as bailee might be transferred by means of an indorsement and delivery of the bill of lading to a third person, whose title to them however, was no better than that of the person by whom the transfer was made. (6 Cyc. 424; Commercial Bank v. Pfeiffer, 108 N. Y. 250; Shaw v. North Pennsylvania R. Co., 101 U. S. 557). A bill of lading is sometimes spoken of as a negotiable or quasi-negotiable instrument. (6 Cyc. 424; Shaw v. North Pennsylvania R. Co., *supra*). What is meant by that term as applied to a bill of lading? * * * [then follow quotations from Shaw v. North Pennsylvania R. Co.] * * * It would seem, therefore, to be the law, in the absence of any statute affecting the question, that the transferee of a negotiable bill of lading would acquire no higher or better title to the goods represented thereby than his transferrer had, unless the true owner of property by his voluntary act or by his negligence or carelessness has put it in the power of another to occupy ostensibly the position of owner so that he may be estopped from asserting his right against a purchaser thereof who has been misled to his hurt by his action or conduct. Negotiability of a bill of lading, therefore, means assignability, so far as the written contract of carriage is concerned, and so far as the goods described in the bill of lading are concerned a conveyance of such title thereto as the transferrer had." See also Spinney v. Thurber, 33 Hun 448, affirmed 102 N. Y. 652; Syracuse First Nat. Bank v. New York Cent. R. Co., 85 Hun 160, 32 N. Y. S. 604.

The Sales Act adds to the rights acquired by a buyer of a document of title all rights held by the original depositor or shipper of the goods and of subsequent indorsees of the document. The common law gave the buyer of the document merely the rights of his immediate seller.

Factor's Act.

It is important to notice the effect of the Factor's Act in giving a certain degree of negotiability to documents of title. That question is discussed in Gass v. Astoria Veneer Mills, *supra*, and the court says (pp. 188-189): "We think it is apparent that the purpose and object of the two statutes taken together was, first, to give a bill of lading, issued in the ordinary form, a higher quality of negotiability than simply to make it transferrable by indorsement and delivery. The voluntary act of the owner of property in giving to another a bill of lading which unqualifiedly directs the common carrier to whom the goods therein described have been committed for transportation,

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to deliver such goods to the person named in the bill of lading or to his order, is deemed a sufficient act to estop him from making any claim upon the goods against a person dealing in good faith with the person named therein. Second, as a further protection to such persons the Penal Code provided for the punishment of the common carrier who should deliver the goods described in such a bill of lading to any other person than the consignee, while such bill of lading was outstanding and might come into the hands of an innocent purchaser thereof." Thus the Factor's Act has the effect of giving negotiability to documents when entrusted to agents for special purposes, while the Sales Act makes all documents negotiable when entrusted to any one for any purpose. (See Pers. Prop. Law, sec. 43). Bills of lading are probably absolutely negotiable by virtue of the Bills of Lading Act. (See note to sec. 113, ante).

It will be germane to notice here several instances in which the buyer of a document of title acquires no title to the goods supposed to be represented by it.

No Goods Shipped or Deposited.

Where no goods have been deposited or shipped obviously the buyer gets no title to any specific goods. But a carrier is estopped to deny the statement in a bill of lading that goods have been received by it for carriage, where the bill was issued by a duly authorized agent, and a *bona fide* purchaser for value has acted on the representation made in a bill to his detriment. *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Batavia Bank v. New York, etc., R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440.

Misdescription of Goods.

Some goods may have been received by the warehouseman or carrier but they may have been misdescribed. The rule regarding action upon the basis of this misdescription is laid down in *Dean v. Driggs*, 137 N. Y. 274, 282, 33 N. E. 326, 19 L.R.A. 302, 33 Am. St. Rep. 721, as follows: "All he [the warehouseman] can be fairly charged with asserting by the mere acknowledgment of the receipt of merchandise thus described is that the box or barrel in which it is packed bears the same outward appearance as does the box or barrel in which merchandise of the character described is usually carried, and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels or character of the barrel or box from that in which goods of the character described are usually transported, and that the articles have been represented to him and that he believes them to be as described." See also *Miller v. Han-*

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nibal R. Co., 90 N. Y. 430, 43 Am. Rep. 179; Chicago First Nat. Bank v. Dean, 137 N. Y. 110, 32 N. E. 1108.

Statutory Rules Regarding Description.

The Warehouse Receipts Law and the Bills of Lading Act now require the warehouseman or carrier to mark the goods "said to contain" or "contents unknown" or in some similar way, if they wish to avoid liability for misdescription. (Gen. Bus. Law, sec. 106; Pers. Prop. Law, sec. 209. See Appendix). This is apparently a change in the law.

Receipt Running to the Giver Invalid.

Where a document is given by a warehouseman to himself or by an officer of a warehousing corporation on behalf of the corporation to himself it cannot have effect as a negotiable document. Yenni v. McNamee, 45 N. Y. 614; Farmers' Nat. Bank v. Lang, 87 N. Y. 209; New York Nat. Banking Assoc. Bank v. American Dock Co., 143 N. Y. 559, 38 N. E. 713; Hanover Nat. Bank v. American Dock Co., 148 N. Y. 612, 43 N. E. 72; Corn Exch. Bank v. American Dock Co., 149 N. Y. 174, 43 N. E. 915.

Deposit by One Not the Owner.

A person depositing goods not his own with a bailee and taking a document of title in his own name, can give no title to the goods to a *bona fide* purchaser by a transfer of the document. Brower v. Peabody, 13 N. Y. 121.

See Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511, regarding the duty of a warehouseman where conflicting claims are made to goods deposited with him. See also Gen. Bus. Law, secs. 103-104.

Sale of Document After Goods Are Destroyed.

If the goods are destroyed after their receipt by the warehouseman or carrier, but before the transfer of the document of title, it is apparent that the transferee of the document can acquire no title to the goods. His rights are defined in sections 88 and 89, ante.

Spent Documents.

Where the document is "spent," that is, where the goods have been delivered by the carrier or warehouseman, obviously no title to the goods can be transferred by means of an outstanding document. National Commercial Bank v. Lackawanna Transp. Co., 59 App. Div. 270, 69 N. Y. S. 396, affirmed 172 N. Y. 596, 64 N. E. 1123.

Liability of Carrier for Failure to Require Surrender of Document.

By section 365 of the Penal Law a person issuing a document is made criminally liable for failure to require the surrender of such document on the delivery of the goods, unless the document is marked on its face "not negotiable." Upon this subject see Colgate v. Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114; Furman v. Union Pac. R.

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Co., 106 N. Y. 579, 13 N. E. 587; National Commercial Bank v. Lackawanna Transp. Co., 59 App. Div. 270, 69 N. Y. S. 396, affirmed 172 N. Y. 596, 64 N. E. 1123; Mairs v. Baltimore R. Co., 73 App. Div. 265, 76 N. Y. S. 838, affirmed 175 N. Y. 409, 67 N. E. 901.

Section 200 of the Personal Property Law (Bills of Lading Act; See Appendix) makes a carrier liable for damage suffered by reason of his failure to take up a bill of lading, and section 98 of the General Business Law makes a similar provision regarding warehouse receipts.

First Bailor's or Shipper's Rights Transferred.

By the Sales Act the negotiation of a negotiable document transfers to the taker all the first bailor's or shipper's rights against the warehouseman or carrier. Under a somewhat similar statute (L. 1858, ch. 326, sec. 6; repealed by L. 1886, ch. 393) it was held that a provision making warehouse receipts not marked non-negotiable transferrable by indorsement gave to the indorsee of such a receipt all the remedies against the warehouseman which the original depositor had. Whitlock v. Hay, 58 N. Y. 484.

Freight.

Concerning the respective liabilities of the original shipper and a taker of the bill of lading for freight, see Elwell v. Skiddy, 77 N. Y. 282; Ackerman v. Redfield, 9 Hun (N. Y.) 378; Gilson v. Madden, 1 Lans. (N. Y.) 172; Jobbitt v. Goundry, 29 Barb. (N. Y.) 509.

§ 115. **RIGHTS OF PERSON TO WHOM DOCUMENT HAS BEEN TRANSFERRED.** A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferrer, the title to the goods, subject to the terms of any agreement with the transferrer. If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document. Prior to the notification of such bailee by the transferrer or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferrer, or by a notification to such bailee by the transferrer or a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer.¹

Effect of Section. This section is believed to alter the effect of the transfer of a non-negotiable instrument in New York. At common law transfer of the instrument was equivalent to delivery of the goods. Under the act more than mere delivery of the document must take place to pass title effectually. See note below.

English Act. The Sale of Goods Act has no corresponding section.

¹ **Rights of Person to Whom Document has been Transferred.** The draftsman of the act says regarding this section: "The rule proposed—*Bogert's Sales*—11.

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vided by the last paragraph of section 34 of the Sales Act is a necessary consequence of the theory of documents of title adopted by that act, for where there is merely a transfer of a non-negotiable document of title the document does not control the possession of the goods, and is not, therefore, a symbol of them. Accordingly there is no delivery, and where delivery is necessary for the transfer of a title good against subsequent purchasers or creditors of the seller, the rights of the transferee are inferior to those of the attaching creditor or the subsequent purchaser." (Williston on Sales, p. 738).

New York Common Law View.

It is submitted, however, that the transfer of a non-negotiable document at common law in New York was equivalent to the delivery of the goods themselves, and that therefore the question of the rights of subsequent purchasers where the seller remained in possession did not arise. "The delivery of the bill of lading not only passes title to the party receiving the same, but, in the eye of the law, the transfer of the bill of lading is regarded as an actual delivery and an actual change of possession of the property (Commercial Bank v. Pfeiffer, 108 N. Y. 242, 250, and authorities there cited.)" Gass v. Astoria Veneer Mills, 121 App. Div. 182, 105 N. Y. S. 794, 134 App. Div. 184, 118 N. Y. S. 982; Gibson v. Stevens, 8 How. 384, 12 U. S. (L. ed.) 1123; Collins v. Ralli, 20 Hun 246, affirmed 85 N. Y. 637; Hoyt v. Hartford F. Ins. Co., 26 Hun 416, affirmed 96 N. Y. 650; Rawls v. Deshler, 3 Keyes (N. Y.) 572; City Bank v. Rome R. Co., 44 N. Y. 136; Yenni v. McNamee, 45 N. Y. 614; Merchants' Bank v. Union R. Co., 69 N. Y. 373, 379; Commercial Bank v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Manufacturers' Commercial Co. v. Rochester R. Co., 117 N. Y. S. 989.

Necessity of Notice.

The New York cases at common law seem to deem notice to the person in possession of the goods unnecessary, and mere delivery of the non-negotiable bill of lading sufficient to constitute a change of possession. Marine Bank v. Wright, 48 N. Y. 1; Western Transp. Co. v. Marshall, 4 Abb. App. Dec. (N. Y.) 575; Dows v. Greene, 32 Barb. (N. Y.) 490, affirmed 24 N. Y. 638. See also Skilling v. Bollman, 73 Mo. 665, 39 Am. Rep. 537; 4 Am. & Eng. Enc. of Law (2d ed.) 553.

The section covers two classes of documents, namely, documents negotiable in form, but not properly indorsed, and documents not negotiable in form. The transferee of a document of the first class may require an indorsement (sec. 116, post).

Analogous Statutory Provisions.

For similar provisions concerning warehouse receipts see Gen. Bus.

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Law, sec. 126, and concerning bills of lading, see Pers. Prop. Law, sec. 219 (appendix).

Massachusetts View.

The doctrine of the section under discussion is adopted in *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433, in which case a creditor who levied upon goods in a warehouse was given priority over a buyer of a non-negotiable receipt for the goods. This was on the theory that there had been no true change of possession until the warehouseman attorned to the buyer of the receipt.

In *Brown v. Floersheim Mercantile Co.*, 206 Mass. 373, 92 N. E. 494, the Sales Act was considered in this connection and it was held that a broker to whom a non-negotiable bill of lading had been delivered for the purpose of selling the goods on commission did not have possession of "goods, effects or credits" of his principal so as to render him liable to trustee process by a creditor of the shipper of the goods. The court said that a non-negotiable bill did not represent the goods. "The Sales Act, upon which the plaintiffs rely, recognizes this distinction. A negotiable bill of lading is made a 'document of title' which upon indorsement passes the property and operates as a direct delivery of the goods of which it is the symbol; * * * while, if non-negotiable, the bill of lading cannot be treated as negotiable and the indorsement confers upon the transferee no additional right. It does not control the possession of the goods, and there is no delivery. The transferee obtains only the title of the transferrer, although by proper notice, where there are no intervening rights, he may require the carrier to hold possession of the property for him according to the terms of the bill. St. 1908, c. 237, §§ 31, 34" (p. 375).

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Transfer without Indorsement.

§ 116. **TRANSFER OF NEGOTIABLE DOCUMENT WITHOUT INDORSEMENT.** Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.¹

Effect of Section. This section is part of the general scheme of the Sales Act to build up for documents of title a degree of negotiability hitherto unknown and thus modifies the common law. See note below.

English Act. The Sale of Goods Act has no corresponding section.

¹ **Transfer of Negotiable Document without Indorsement.** "This provision is copied from a similar provision in the Negotiable Instruments Law, and it is obvious that if indorsement is essential to a perfect title for a purchaser, he should have a right to compel one who has purported to transfer title to him to make that indorsement." (Williston on Sales, p. 740).

Analagous Statutory Provisions.

Corresponding sections are found in sec. 79, Neg. Inst. Law, sec. 127, Gen. Bus. Law and sec. 220, Pers. Prop. Law (See appendix).

New York Common Law.

As has been stated, the New York courts have not regarded indorsement of an order bill as necessary to transfer the title to the goods which it represented. They have considered delivery sufficient. *City Bank v. Rome R. Co.*, 44 N. Y. 136; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Merchants' Bank v. Union R. Co.*, 69 N. Y. 373. Therefore, the question of the right to compel an indorsement of a document has had no importance.

See *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L.R.A. 595, 16 Am. St. Rep. 765, concerning the effect of an indorsement of a negotiable instrument made after the instrument was transferred.

§ 117. **WARRANTIES ON SALE OF DOCUMENT.** A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a) That the document is genuine;
- (b) That he has a legal right to negotiate or transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.¹

Effect of Section. This section is probably declaratory of the common law. See note below.

English Act. There is no corresponding section of the Sale of Goods Act.

¹ **Warranties on Sale of Document.** "The provisions of the Sales Act in regard to warranties on the negotiation or transfer of a document of title for value probably express the existing law apart from statute." (Williston on Sales, p. 743).

Analogous Statutory Provisions.

Section 115 of the Negotiable Instruments Law is the source of subdivisions (a), (b) and (c). For corresponding sections see Gen. Bus. Law, sec. 128 and Pers. Prop. Law, sec. 221 (appendix).

Similar Warranties on Sale of Bills and Notes.

For cases discussing the warranties named in subdivisions (a), (b)

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and (c) in connection with bills and notes, see *Whitney v. National Bank*, 45 N. Y. 303; *Littauer v. Goldman*, 72 N. Y. 506, 28 Am. Rep. 171; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994; *Canal Bank v. Albany Bank*, 1 Hill (N. Y.) 287; *Herrick v. Whitney*, 15 Johns. (N. Y.) 240.

It is apparent that it is immaterial whether a sale be made directly of the goods themselves or of the goods by means of documents representing them. In both cases the seller's liability ought to be the same, and so subdivision (d) provides. See sections 93-97, ante.

Assignment of Claim Secured by Document.

Upon the question of the liability of "one who assigns for value a claim secured by a document of title," see *Ross v. Terry*, 63 N. Y. 613, in which case it was held that one assigning a mortgage with warranty and a bond along with it but without express warranty, impliedly warrants the validity of the bond since the bond is the principle debt and the mortgage would not be valid if the bond were invalid.

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Indorser not a Guarantor.

§ 118. **INDORSER NOT A GUARANTOR.** The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.¹

Effect of Section. This section doubtless states the pre-existing law. See note below.

English Act. The Sale of Goods Act has no corresponding section.

¹ **Indorser Not a Guarantor.** "The indorsement of a document of title seems generally to have been understood to amount to a conveyance merely by the indorser, not a contract of guaranty, and such is the law, even though a local statute declares that bills of lading are negotiable like bills of exchange." (Williston on Sales, p. 744).

For cases supporting the theory of the section see *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 557, 25 U. S. (L. ed.) 892; *Mida v. Geissmann*, 17 Ill. App. 207; *Maybee v. Tregent*, 47 Mich. 495, 11 N. W. 287; *Gass v. Astoria Veneer Mills*, 134 App. Div. 184, 185, 187, 118 N. Y. S. 982.

Analogous Statutory Provisions.

For sections concerning various commercial documents and covering a similar field, see *Neg. Inst. Law*, sec. 116; *Gen. Bus. Law*, sec. 129; *Pers. Prop. Law*, sec. 222 (appendix).

§ 119. Fraud, Mistake or Duress in Negotiation.

§ 119. **WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, MISTAKE OR DURESS.** The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.¹

Effect of Section. In connection with the preceding sections this section has the effect of modifying the common law by extending the negotiability of documents of title. See note below.

English Act. There is no corresponding section in the Sale of Goods Act.

¹ **When Negotiation Not Impaired by Fraud, Mistake or Duress.** "This section of the Sales Act merely elaborates section 32 (b). [Pers. Prop. Law, sec. 113]. As a change of the common law was intended, it seemed desirable to make this statement abundantly clear, especially as courts have shown an inclination to limit the effect of statutes aimed at making documents of title negotiable." (Williston on Sales, p. 746).

Common Law.

At common law the transferee or indorsee of a document obtained merely the title which his transferrer or indorser had, regardless of whether the document had been intrusted to the transferrer or indorser or not, and regardless of whether there had been breach of duty, fraud, mistake or duress in the transfer or indorsement. See notes to sections 113 and 114, ante.

§ 119. Fraud, Mistake or Duress in Negotiation.

Analogous Statutory Provisions.

For sections of other commercial acts covering the same subject, see Neg. Inst. Law, sections 94 and 96; Gen. Bus. Law, sec. 131; Pers. Prop. Law, sec. 224 (see appendix).

If the owner of a document of title wishes to protect himself against fraud on the part of a person to whom he intrusts the document, he should stamp upon it the purpose for which it is intrusted to the agent, and then all persons dealing with the document will take with notice. *Farmers' Nat. Bank v. Logan*, 74 N. Y. 568.

§ 120. ATTACHMENT OR LEVY UPON GOODS FOR WHICH A NEGOTIABLE DOCUMENT HAS BEEN ISSUED. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.¹

Effect of Section. This section is a continuance of the treatment of a document of title as a negotiable instrument and so differs from the common law, which regarded it as a symbol of the goods. See note below.

English Act. There is no corresponding section in the Sale of Goods Act.

¹ Attachment or Levy upon Goods for Which a Negotiable Document Has Been Issued. *Commissioners' Note.* "If the mercantile theory of documents of title, such as bills of lading and warehouse receipts, were carried to its logical extent, no attachment of the goods represented by the document or levied upon them could be permitted while the negotiable document was outstanding. For the mercantile theory is founded upon the idea that a negotiable document of title represents the goods and may be safely dealt with on that assumption. For one and the same reason it is not admissible for the bailee to deliver the goods without taking up an outstanding negotiable receipt for them, and for the law to allow attachment or levy upon the

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goods, regardless of outstanding negotiable documents. For a similar reason the maker of negotiable notes is protected by garnishment; in most states by absolutely disallowing such garnishment and in other states by making any garnishment subject to the rights of even a subsequent purchaser for value before maturity of the paper. Likewise by statute in some states an attachment of stock is postponed to a subsequent purchaser of the stock certificate. *Clews vs. Friedman*, 182 Mass. 555. So in the case of carriers, some protection against garnishment has been given. In most states, if the goods are actually in transit the carrier cannot be garnished, 14 Am. & Eng. Enc. of Law 810. A transfer of the bill of lading prevails over a subsequent attachment. *Mather vs. Gordon*, 59 Atl. 424 (Conn.); *Robert C. White Co. vs. Chicago & C. R. R. Co.*, 87 Mo. App. 330; *Union Bank vs. Rowan*, 23 S. C. 339; and in *Peters vs. Elliott*, 78 Ill. 321, it was held that an attaching creditor of a consignor was postponed to one who bought the bill of lading subsequently. It was thought best in this draft not to take the extreme position that no attachment, garnishment or levy could be made on property for which a negotiable document was outstanding, but to cover the essential practical point by making it a condition of the validity of such seizure that the negotiation of the document be enjoined or the document impounded. The following section expressly gives the court full power to aid, by injunction and otherwise, a creditor seeking to get at a negotiable document and the property covered thereby." (Note of Commissioners on Uniform State Laws, 30 Am. Bar Assoc. Rep. 368, 369).

Illustrative Common Law Cases.

Where parties agree that title shall be reserved in the seller until payment of a draft for the price, the creditors of the buyer can acquire no rights in the goods prior to such payment, even though the bill of lading is a straight bill, and is made to the buyer. *Merchants' Exch. Bank v. McGraw*, 59 Fed. 972, 8 C. C. A. 420. A bank taking a bill of lading indorsed by the shipper to the consignee as security for the payment of a draft discounted by the bank, takes a title superior to that of creditors of the shipper who attach the goods after the delivery of the bill to the bank. *Chicago First Nat. Bank v. Bayley*, 115 Mass. 228. A bank receiving a bill of lading from a shipper, indorsed by him to the buyer, and discounting a draft on the buyer upon the security of such bill of lading, gets a title superior to an attaching creditor of the buyer who attaches the goods while in transit. *Mather v. Gordon*, 77 Conn. 341, 59 Atl. 424. A person taking a bill of lading for goods shipped has a title superior to that of creditors of

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the shipper who attach the goods after the transfer of the bill. *Peters v. Elliott*, 78 Ill. 321. Where a warehouseman gives a receipt for cotton stored by A in which he promises to deliver the cotton to A or the bearer of the receipt, and the warehouseman is subsequently served with summons of garnishment by a creditor of A, the warehouseman is not relieved from liability by the delivery of the cotton to the holder of the receipt, to whom it was transferred after the service of the garnishment. *Smith v. Pickett*, 7 Ga. 104, 50 Am. Dec. 385.

Analogous Statutory Provisions.

For corresponding sections of the Warehouse Receipts Law and the Bills of Lading Act, see Gen. Bus. Law, sec. 110, and Pers. Prop. Law, sec. 210 (appendix).

§ 121. Creditors' Remedies to Reach Documents.

§ 121. CREDITORS' REMEDIES TO REACH NEGOTIABLE DOCUMENTS. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot be readily attached or levied upon by ordinary legal process.¹

Effect of Section. The section is obviously merely a statement that existing remedies are continued.

English Act. The Sale of Goods Act has no corresponding section.

¹**Creditors' Remedies to Reach Negotiable Documents.** "As the right of legal garnishment of bailed property is limited by the preceding section, section 40 [Pers. Prop. Law, sec. 121] gives the creditor such rights as are included under the heads of bills of equitable attachment or in aid of execution." (Note of Commissioners on Uniform State Laws, American Uniform Commercial Acts, p. 95).

Analogous Statutory Provisions.

For corresponding sections of the Warehouse Receipts Law and Bills of Lading Act, see Gen. Bus. Law, sec. 111, and Pers. Prop. Law, sec. 211 (appendix).

PART III.
PERFORMANCE OF THE CONTRACT.
CHAPTER X.

CONTRACTUAL OBLIGATIONS OF THE PARTIES.

§ 122. **SELLER MUST DELIVER AND BUYER ACCEPT GOODS.** It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Effect of Section. The section is declaratory of elementary principles and will be considered with section 123. See note to that section.

English Act. Section 27 of the Sale of Goods Act is the model from which this section is taken.

§ 123. Delivery and Payment Concurrent Conditions.

§ 123. DELIVERY AND PAYMENT ARE CONCURRENT CONDITIONS. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.¹

Effect of Section. This section is obviously declaratory of fundamental principles of the common law. See note below.

English Act. Section 28 of the Sale of Goods Act is the equivalent of this section.

¹**Delivery, Acceptance and Payment.** "In contracts for the purchase of property, real or personal, where there is no stipulation for credit or delay on either side, the delivery of the property (or its conveyance where it is of a nature to pass by grant), and the payment of the price are each conditions of the other, and neither party can sue for a breach without having offered performance on his part." *Tip-ton v. Feitner*, 20 N. Y. 423, 425. "Upon the ordinary agreement to sell and to purchase personal property, in the absence of any agreement or provision in the agreement as to the time or manner of payment, delivery and payment are simultaneous acts, and, as a tender, is equivalent in law to performance; a tender of delivery or payment by one person to the other gives the person making the tender the right to enforce the performance of the contract against the other." *Sawyer v. Dean*, 114 N. Y. 469, 477, 21 N. E. 1012.

Illustrative Cases.

For similar statements and holdings supporting the doctrine of sections 122 and 123, see *Dunham v. Pettee*, 8 N. Y. 508, 512, 513; *Pope v. Terre Haute Car Co.*, 107 N. Y. 61, 65, 13 N. E. 592; *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080; *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. S. 380; *Phelan v. Jones*, 114 N. Y. S. 9; *Armstrong v.*

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Heide, 47 Misc. 609, 94 N. Y. S. 434; Hendrickson v. Callan, 70 Misc. 342, 128 N. Y. S. 980; Cook v. Ferral, 13 Wend. (N. Y.) 285; Porter v. Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; Kelley v. Upton, 5 Duer (N. Y.) 336, 340.

Delivery.

For a discussion of the meaning of the word "delivery" see Stanley v. Dryer, 70 Misc. 561, 127 N. Y. S. 468, and section 156, post. It is obvious that the parties may agree that the payment shall be wholly or partly before delivery. Joyce v. Adams, 8 N. Y. 291. While delivery and payment are concurrent conditions, the buyer, where delivery is tendered to him unexpectedly, is entitled to a reasonable time to procure cash if the seller refuses to take a check. Bass v. White, 65 N. Y. 565. Where delivery strictly according to the contract is prevented by an order of the board of health of New York, the seller is excused from strict performance but required to make the best performance possible. J. H. Labaree Co. v. Crossman, 100 App. Div. 499, 92 N. Y. S. 565, affirmed 184 N. Y. 586, 77 N. E. 1189.

Acceptance.

Where the buyer fails to remove the goods the seller's duty is that of a gratuitous bailee only. Koon v. Brinkerhoff, 39 Hun (N. Y.) 130. Where the buyer cannot know until notice from the seller that the goods are ready for delivery, he is not in default for not accepting the goods until such notice is given. National Coal Tar Co. v. Malden Gaslight Co., 189 Mass. 234, 75 N. E. 625.

Tender.

Tender of delivery is equivalent to delivery. Bement v. Smith, 15 Wend. (N. Y.) 493. Tender of a check is insufficient as tender of the price. Volk v. Olsen, 54 Misc. 227, 104 N. Y. S. 415.

Excuse for Non-delivery.

Where payment is to be made in the notes of a third party who becomes insolvent before delivery, the seller is excused from making delivery. Benedict v. Field, 16 N. Y. 595; Roget v. Merritt, 2 Cai. (N. Y.) 117; Waldron v. Stevens, 12 Wend. (N. Y.) 100. Negotiable paper of a third person is presumptively taken as absolute payment. Gibson v. Tobey, 46 N. Y. 637, 7 Am. Rep. 397.

Credit.

Credit extends from the day of delivery. Grabfelder v. Vosburgh, 90 App. Div. 307, 85 N. Y. S. 633. If no credit be given, the fact that notes were taken for the price does not prevent suit for the price before the notes mature. Fuller v. Negus, 55 Hun 608, 8 N. Y. S. 681.

Default After Part Payment.

"Where a vendor of chattels, when the period of performance ar-

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rives, is ready and offers to perform on his part, and the purchaser neglects and refuses to perform for any reason, he cannot recover back the partial payments he has made." *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40, 45, 21 N. E. 49; *Scher v. Roher*, 34 Misc. 792, 69 N. Y. S. 929; *Haynes v. Hart*, 42 Barb. (N. Y.) 58; *Monroe v. Reynolds*, 47 Barb. (N. Y.) 574.

Bogert's Sales—12.

§ 124. PLACE, TIME AND MANNER OF DELIVERY. 1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.¹

2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.²

3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.³

4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.⁴

5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.⁵

Effect of Section. The section is declaratory of the common law.

English Act. The American section is modelled after section 29 of the Sale of Goods Act and is its substantial equivalent. Where the buyer of a launch to be delivered on a certain date is to provide a ship to receive it, and he does not notify the seller that he has a ship ready to receive it, the seller is not liable for damages for breach of contract because of three months' delay in readiness to deliver the launch. *Forrest v. Aramayo*, 83 L. T. N. S. 335.

¹ **Place of Delivery.** "By the general rule of law, the vendor on a sale of chattels is bound to deliver them to the vendee at the place where they are at the time of the sale, on performance by the latter of the terms of sale, although the contract is silent on the subject of delivery. The obligation to deliver, if not expressed, is implied." *Gray v. Walton*, 107 N. Y. 254, 258, 14 N. E. 191. See also *E. W. Bliss Co. v. U. S. Incandescent Gas Light Co.*, 149 N. Y. 300, 305, 43 N. E. 859. "There is no doubt that as a general rule the store of the merchant, the shop of the mechanic or manufacturer, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, is the place of delivery when the contract is silent as to the place." *Bronson v. Gleason*, 7 Barb. (N. Y.) 472, 475. To the same effect see *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. S. 380; *Terry v. Wheeler*, 25 N. Y. 520; *Rice v. Churchill*, 2 Den. (N. Y.) 145; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Halvordson v. Grossman*, 107 N. Y. S. 627.

Constructive Delivery.

A verbal offer to deliver bulky goods such as lead is sufficient offer of performance to sustain an action for the refusal to take the lead. *Pollen v. Le Roy*, 30 N. Y. 549. Delivery of an order on a warehouse where goods are stored is sufficient delivery to allow a recovery of the purchase price. *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. S. 380. Tender of iron may be made by means of a permit by which the iron may be obtained. *Dunham v. Pettee*, 8 N. Y. 508. See also *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364. Where logs are prepared for delivery and the buyer notified, the seller has made sufficient

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tender, in view of the cumbersome nature of the goods. *Bates v. Conkling*, 10 Wend. (N. Y.) 389.

Demand for Delivery Sometimes Necessary.

Where the defendant agrees to deliver to the plaintiff 1000 tons of coal per month "alongside within limits," but plaintiff was not bound to take the full monthly installments, but only to live up to the contract as nearly as possible, the contract was "so indefinite as to the amount to be delivered and the place of delivery" that "defendant was under no obligation to tender delivery until demand was made upon him, or at least he was notified when, where, and how much to deliver." *Thedford v. Herbert*, 135 App. Div. 174, 119 N. Y. S. 1025.

Delivery Waived.

Where a contract of sale requires the seller to deliver a locomotive f. o. b. at the seller's place of business, and the seller notifies the buyer that the railroad will not accept the locomotive for transportation, and the buyer states that he will negotiate with the railroad for transportation, the seller may, after waiting from December 5 until January 22, maintain an action for the price of the goods. *Mersereau v. L. K. Hirsch Co.*, 136 App. Div. 271, 121 N. Y. S. 11.

2 Time of Delivery. "There is no allegation in the complaint as to the time within which the contract was to be performed by delivery of the iron, and no time is mentioned in the written contract. The law supplies the omitted term, and the contract in legal effect was an engagement on the part of the plaintiffs to deliver within a reasonable time." *Pope v. Terre Haute Car, etc., Co.*, 107 N. Y. 61, 65, 13 N. E. 592. See also *Tobias v. Lissberger*, 105 N. Y. 404, 410, 12 N. E. 13, 59 Am. Rep. 509; *Eppens, etc., Co. v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19, 52 L.R.A. 811.

Question of Fact or Law.

"What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law." *Wright v. Bank of Metropolis*, 110 N. Y. 237, 249, 18 N. E. 79, 1 L.R.A. 289, 6 Am. St. Rep. 356. See also *Colt v. Owens*, 90 N. Y. 368. Ordinarily, of course, the question is one of fact.

Computation of Time.

"In general, the period of a month is construed to mean a lunar month, unless it is otherwise expressed; but in the case of bills of exchange, the mode of computing time is by calendar, and not lunar months." *Leffingwell v. White*, 1 Johns. Cas. (N. Y.) 99, 100, 101, 1 Am. Dec. 97. "The word 'until' is very frequently employed in a sense excluding the day named, and that is its more obvious mean-

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ing, though it must be conceded that a very slight matter in the context would be sufficient to give it a different and inclusive sense." *People v. Walker*, 17 N. Y. 502, 503.

Where the defendant agreed to buy bonds "within one year from January 1st, 1909," the first day of January, 1910, is not excluded from the computation as to the time within which tender must be made, simply because it is a public holiday. *Hendrickson v. Callan*, 70 Misc. 342, 128 N. Y. S. 980. See sec. 20, Gen. Construction Law. "In computing the time mentioned in a contract for the doing of an act, intervening Sundays are to be counted; but when the day for performance falls on Sunday, it is not to be taken into the computation." *Salter v. Burt*, 20 Wend. (N. Y.) 205, 207, 32 Am. Dec. 530. See also *Croninger v. Crocker*, 62 N. Y. 151, 156.

Defendants agreed to sell bonds to plaintiffs "when, as and if issued." Held, that defendants were bound to tender the bonds as soon as a sufficient number had been issued to enable them with due diligence to obtain the contract amount, and that they could not wait until the entire issue was out. *Zimmerman v. Timmerman*, 193 N. Y. 486, 86 N. E. 540.

For other cases upon the subject of time of delivery, see *Currie v. White*, 45 N. Y. 822; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509; *Morel v. Stearns*, 43 Misc. 639, 88 N. Y. S. 416; *Brown v. Bard*, 64 Misc. 249, 118 N. Y. S. 371; *Braitsch v. Kiel, etc., Co.*, 114 N. Y. S. 872.

Necessity of Notice.

Frequently the question of time of delivery is affected by the necessity of notice of readiness to deliver or notice of readiness to receive. Where a custom of the trade shows that goods are not to be delivered until specifically ordered by the buyer, the seller may recover the price without proof of delivery or tender. *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844. Sometimes the buyer is under a duty to name the place of delivery. *Hunter v. Wetsell*, 84 N. Y. 549, 555, 38 Am. Rep. 544. Sometimes it is the seller's duty to notify the buyer that the goods are complete. *E. W. Bliss Co. v. U. S. Incandescent Gas Light Co.*, 149 N. Y. 300, 305, 43 N. E. 859; *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. S. 380. For other cases on the subject of notice, see *Cook v. Ferral*, 13 Wend. (N. Y.) 285; *Genesee College v. Dodge*, 26 N. Y. 213, 214, 215.

3 Goods in Possession of Third Person at Time of Sale. "Where a vendor makes sale of personal property in the custody of a third person, who is his bailee, and gives a delivery order to the vendee, it has long been settled that this will not amount to a delivery so

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as to vest the title in the vendee, until the order is presented and such third person agrees to become the bailee of the purchaser, expressly or impliedly." *Edwards v. Meadows*, 71 Ala. 42, 46. See also *Buddle v. Green*, 27 L. J. Exch. (Eng.) 33; *Barney v. Brown*, 2 Vt. 374, 377, 19 Am. Dec. 720; *Spaulding v. Austin*, 2 Vt. 555.

"Where the articles at the time of the sale or transfer are in the hands of one who has a lien upon them, notice to him of such sale or transfer is sufficient to constitute a delivery, as against subsequent attaching creditors." *Freiberg v. Steenbock*, 54 Minn. 509, 513, 514, 56 N. W. 864. See also *Hodges v. Hurd*, 47 Ill. 363; *Carter v. Willard*, 19 Pick. (Mass.) 1; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389; *Buhl Iron Works v. Teuton*, 67 Mich. 623, 35 N. W. 804.

A distinction is made between delivery sufficient to satisfy the seller's obligation to the buyer, and delivery sufficient to protect the buyer against creditors of the seller.

⁴Seasonable Demand or Tender of Delivery. "The rule is that a tender of bulky articles in the performance of an agreement must be seasonably made, so that the person may have an opportunity to examine the articles tendered, and see that they are such as they purport to be, and such as he is entitled to demand, before the close of the day on which the delivery is to be made. Whether the tender should be made before sunset may depend upon circumstances, and does not appear to have been decided by the courts of this state. But when daylight is required for the proper examination and assortment of the goods tendered, there can be but little doubt that time should be given the tenderer for such examination before sunset and by daylight. The evidence is that wool can only be examined and its quality ascertained by daylight, and that the inspection of the quantity contemplated by this contract would require more than one whole day. * * * The tender was insufficient as unseasonably made." *Croninger v. Crocker*, 62 N. Y. 151, 158. Tender here was made late at night upon the last day.

⁵Duty of Seller to Put Goods in Deliverable Condition. "The provision is declaratory of the law and seems to be a necessary consequence of the duty of the seller to deliver the goods bargained for." (Williston on Sales, p. 783).

§ 125. DELIVERY OF WRONG QUANTITY. 1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.¹

2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.²

3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.³

4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Effect of Section. The section seems to be declaratory of the common law, except that it apparently abolishes the doctrine of *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183, that a seller who has only partly performed cannot recover, even in quasi-contract. See note below.

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Delivery of Wrong Quantity.

English Act. Section 30 of the Sale of Goods Act has been closely followed in the modelling of this section. Where laths are to be shipped to the buyer and the contract provides that, should any dispute arise concerning the question whether the laths corresponded with the contract, the buyer should not reject them but submit the question to arbitrators; and laths are shipped which are either practically worthless or very difficult of sale because of variances from the contract requirements, the buyer may reject them. The provision for arbitration applies only to slight differences, and not to radical departures from the stipulation of the contract. *Vigers v. Sanderson*, [1901] 1 K. B. 608, 84 L. T. N. S. 464. For a case illustrating a trade custom that contracts calling for "about" a certain quantity should be satisfied by delivery of a quantity within five per cent of the amount named, see *Société Anonyme, etc. v. Scholefield*, 7 Com. Cas. 114. Where a buyer contracts to buy all the acid required in a manufacturing plant and the business is abandoned and the factory not operated, the buyer is under no obligation to take any acid. *Berk v. International Explosives Co.*, 7 Com. Cas. 20.

A recent English case construing the corresponding section of the English Act is referred to in the New York Law Journal for April 10, 1912. The case is *Shipton v. Braltress*, decided by Lush, J., on Feb. 22, 1912, and reported thus far only in *The Solicitor's Journal & Weekly Reporter* (London) for March 23, 1912 (vol. 56, p. 375). In that case the seller contracted to deliver a cargo of wheat, "weight as per bill or bills of lading, say 4,500 tons, two per cent., more or less; seller has the option of shipping a further 8 per cent., more or less, on contract quantity." The seller tendered 4,950 tons and 55 pounds, 4,950

tons being the maximum which the sellers were entitled to deliver under the contract. The buyer rejected the goods on the ground that the amount tendered was in excess of the contract quantity. The seller then brought this action to recover damages for the non-acceptance of the cargo. Recovery was allowed. The court held that the excess tendered was too trifling to amount to a breach of the contract by the seller. The following is a quotation from the London periodical mentioned: "The learned judge gives as the reason why an excess in tender entitles a buyer to reject that the seller seeks to impose a burden on the buyer which he is not entitled to impose. That reason cannot exist where there is nothing to suggest that the sellers would ever have insisted or thought of insisting on the payment of the trifling sum which represented the excess over the contract price."

¹ Delivery of Quantity Smaller Than Contract Amount. "The contract being entire, unless all the lumber had been manufactured and delivered at the place specified in the agreement before the expiration of the time fixed, the defendant was not bound to accept any of the lumber nor to pay for any quantity short of the entire amount contracted for." *Hilton, etc., Lumber Co. v. Sizer*, 137 App. Div. 661, 663, 122 N. Y. S. 306. Accord, *Corning v. Colt*, 5 Wend. (N. Y.) 253; *Brown v. Norton*, 50 Hun 248, 2 N. Y. S. 869. Thus the right to reject an insufficient quantity was clear at common law.

Buyer's Liability for Part Delivered.

But often the insufficient quantity was accepted and used by the buyer, either with or without knowledge that no more goods would be delivered. The New York doctrine upon that subject was peculiar. A leading case is *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183, in which case the contract called for the delivery of bottles during April, May and June. The seller delivered part of the amount due in April and then failed to deliver the balance. In an action to recover for the portion delivered, it was held that there could be no recovery, either in contract or in quasi-contract. The court said: "The contract was entire and called for an entire performance, and

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until such performance was made or tendered there was no liability on the part of the defendant. * * * The idea of an equitable right of recovery in such cases, which was discountenanced by the Chancellor in his opinion there [that is, in *Champlin v. Rowley*, 18 Wend. 187], has found no more favor in the courts of this state subsequently. * * * The defendant was not bound to retain the articles delivered to him under the contract in the course of the month of April or of any other month included within its limits, without using or disposing of them until the contract, or even the month had expired, to ascertain whether the vendors would perform their agreement. He made his contract to obtain the articles which he was to buy for immediate and constant use, and no one could have demanded or expected that he would not use them as they were required in his business. But if he did not waive the performance of the contract, he had a right to insist upon its performance as an entirety, and when the vendors, without cause or excuse, refused to perform it, he was not bound to return what he had received, nor could he be compelled to pay for a part performance." (p. 222). For other expositions of this doctrine, see *Bruce v. Pearson*, 3 Johns. (N. Y.) 534; *Champlin v. Rowley*, 13 Wend. (N. Y.) 258, 18 Wend. (N. Y.) 187; *Mead v. Degolyer*, 16 Wend. (N. Y.) 632; *Hill v. Heller*, 27 Hun (N. Y.) 116; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Baker v. Higgins*, 21 N. Y. 397; *Kein v. Tupper*, 52 N. Y. 550; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. 475.

Waiver.

But it was held at common law that the buyer might waive the full performance if there was any evidence of an intent to make a new contract to accept and pay for a part of the contract amount. *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

The Sales Act provides that where the buyer accepts part of the goods without knowledge that the balance will not be delivered, he "shall not be liable for more than the fair value to him of the goods so received." Apparently the intent is to make him liable for the fair value, although it is not affirmatively so stated. If the act be construed to give a quasi-contract liability under such circumstances, a radical and important change in the law of Sales in New York will have been wrought.

² **Delivery of Too Large an Amount.** *Downer v. Thompson*, 6 Hill (N. Y.) 208, was an action to recover the price of 250 barrels of cement. The seller delivered 260 barrels and the buyer objected to the delivery on the ground of quality, not of quantity. Held, that a nonsuit was improper. The question should have been submitted to

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the jury, whether the delivery of the 260 barrels was as a mere compliance with the order, or with the intention of charging the defendants with the excess. "If the plaintiff forwarded the two hundred and sixty barrels as and for two hundred and fifty barrels, in order that no dissatisfaction might exist as to the quantity, or for any order, the defendant was not bound either to make a selection of two hundred and fifty barrels; and whether he did so, was a proper question for the jury to decide. On the other hand, if the two hundred and sixty barrels were not sent as a mere compliance with the order, the defendant was not bound either to make a selection of two hundred and fifty barrels out of the larger number, or to take the extra ten barrels and pay for them; and should a jury find that such was the fact, as the sale would then be incomplete as well for two hundred and fifty as for two hundred and sixty barrels, the defendant would be entitled to their verdict." (p. 214). See also *Rommel v. Wingate*, 103 Mass. 327; *Lamb v. Traitel*, 12 Misc. 140, 32 N. Y. S. 1075; *Drucklieb v. Universal Tobacco Co.*, 106 App. Div. 470, 94 N. Y. S. 777. Subdivision 2 is thus apparently declaratory of the common law.

³ **Delivery of Contract Goods Mixed With Others.** "A tender of a larger bulk, from which the plaintiff might with great labor have selected the quantity, and of the quality they had purchased, was an insufficient tender, and a refusal to perform the contract except by delivery of the wool in bulk, the good and bad mingled together, requiring labor to separate them, was a breach of the agreement, subjecting the defendants to an action for damages, and for the recovery of the money paid or advanced upon it." *Croninger v. Crocker*, 62 N. Y. 151, 157. Tender of goods called for by the contract mixed with goods the delivery of which is past due, is not a valid tender. The buyer is not bound to sort out the goods which are delivered in time, but may reject the whole lot. *Braitsch v. Kiel, etc., Co.*, 114 N. Y. S. 872. See also *Clark v. Baker*, 11 Met. (Mass.) 186, 45 Am. Dec. 199; *Flint v. Standard Rope, etc., Co.*, 52 App. Div. 459, 65 N. Y. S. 238; *Hoffman v. King*, 58 Wis. 314, 17 N. W. 136.

What Is the Contract Amount?

Questions frequently arise concerning the amount of goods called for by the contract. What is the right quantity to tender? The rules applied in the interpretation of contracts calling for "about" a certain quantity, or a certain quantity "more or less," are considered in *Brawley v. U. S.*, 96 U. S. 168, 24 U. S. (L. ed.) 622. An agreement to deliver a cargo of iron to arrive by a certain ship, of about 300 or 350 tons, is performed by delivery of the entire cargo,

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though it be only 227 tons. *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589. But see *Flanagan v. Demarest*, 3 Robt. (N. Y.) 173.

A contract to deliver all the goods which a buyer may "require at my two jobs" means all the goods necessary to complete the work, and not all that the buyer might ask to have delivered. *Miller v. Leo*, 35 App. Div. 589, 55 N. Y. S. 165, affirmed 165 N. Y. 619, 59 N. E. 1126. See also *East v. Cayuga Lake Ice Line*, 66 Hun 636 mem., 21 N. Y. S. 887; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L.R.A. 218.

For instances of contracts where one party is obligated to take a certain amount and has an option to take more, see *Ready v. J. L. Fulton Co.*, 179 N. Y. 399, 72 N. E. 317; *A. B. Farquhar Co. v. New River Mineral Co.*, 87 App. Div. 329, 84 N. Y. S. 802.

A contract for the delivery of "number 1 hay," with a provision for fixing the price to be paid for inferior hay if such be delivered, contemplates that the great mass of the hay delivered shall be "number 1 hay," and a delivery of hay, more than half of which is not of that kind is not a performance of the obligation to deliver. *Bloomingtondale v. Hewitt*, 40 App. Div. 208, 58 N. Y. S. 9, affirmed 170 N. Y. 568, 62 N. E. 1094.

Where an offer to sell leaves doubtful the amount of goods which the seller is willing to sell at the price named, the buyer cannot make a contract by accepting the proposition. *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4.

§ 126. DELIVERY IN INSTALLMENTS. 1. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

2. Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.¹

Effect of Section. The section is probably declaratory of the common law, although the New York courts seem to have regarded the breaches named in sub-section 2 as always material and therefore always constituting a breach of the entire contract. See note below.

English Act. Section 31 of the Sale of Goods Act is the model for this section, but the English section differs materially in making intention to repudiate instead of materiality of breach the basis of granting the right to the injured party to refuse to proceed with the contract. Where the seller contracts to deliver 1100 pieces of timber in two installments, and the first delivery is found by an arbitrator to have been so defective as to constitute a breach

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of the contract warranting repudiation by the buyer, the award will not be set aside as bad on its face. Whether the breach be partial or one allowing repudiation is a question of fact in each case. *Millar's Karri, etc., Co. v. Weddel*, 100 L. T. N. S. 128. By a contract for the sale of steel tinplate bars to be delivered over a period of three months, payment to be made in cash in fourteen days after delivery, it was provided that all payments should be made on due date as a condition precedent to future deliveries. The purchasers having made default in payment on due date, held that the vendors were justified in unconditionally refusing to make any further deliveries. *Ebbw Vale Steel, etc., Co. v. Blaina Iron Co.*, 6 Com. Cas. 33.

¹ **Delivery in Installments.** "This section is slightly altered from section 31 of the English Act. The English Act, following prior English decisions, makes repudiation by one party the test of the right of the other to refuse to go on. The section here given makes the materiality of the breach the test. This is in accord with the weight of American authority. *Norrington v. Wright*, 115 U. S. 188; 14 Harv. L. Rev. 323." (Note of Commissioners on Uniform State Laws, American Uniform Commercial Acts, p. 98).

New York Rule.

"In a contract for the sale of goods to be delivered in installments, a failure of the seller to deliver, or of the buyer to accept, one installment constitutes such a breach of the contract as will give the party not in default the right to rescind the entire contract." *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 124, 125, 88 N. E. 24, 21 L.R.A.(N.S.) 864. "It is also settled in this state that where goods are to be delivered in installments under an executory contract, an acceptance of certain installments thereunder does not prevent a rescission of the contract in case of failure thereafter to perform in accordance with the terms of such contract." *Idem*, 195 N. Y. 125. But in this case there was a waiver of the right to insist on full performance. For other cases in which failure to deliver or ship within the required time has been considered a breach of the whole contract, see *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 U. S. (L. ed.) 366; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304.

Default in Installment Payment.

The failure of the buyer to pay an installment of the price has also been held to constitute a breach of the entire contract justifying repudiation by the seller. *Gardner v. Clark*, 21 N. Y. 399; *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Price v. New York*, 104 App. Div. 198, 93 N. Y. S. 967; *American Broom, etc., Co. v. Addickes*, 19 Misc. 36, 42 N. Y. S. 871; *Barnes v. Denslow*, 56 Hun 640, 9 N. Y. S. 53.

Default in Acceptance.

The refusal of the buyer to accept one installment is a breach of the entire contract which entitles the vendor to rescind. *Ganser v. Weber*, 35 Misc. 303, 71 N. Y. S. 773.

Installment Deficient in Quality.

But apparently if the seller delivers one installment inferior in quality and not in quantity, there is not such a breach of the contract as to justify the buyer in repudiating the entire contract. *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

Illustrative Cases.

In *Tipton v. Feitner*, 20 N. Y. 423, it was held that a contract to deliver hogs and dressed pork was a divisible contract and that the seller could recover for the delivery of the pork, although he had failed to deliver the hogs.

Where goods are sold to be paid for in installments, the title to remain in the seller until full payment, the seller cannot sue for the full price until default in making the last payment. He then has the option of suing for the full price or of replevying the goods. *Taylor v. Esselstyn*, 62 Misc. 633, 115 N. Y. S. 1105.

Where the buyer orders twelve gross of goods to be delivered one gross a month, and the seller never accepts the offer, but delivers a number of installments, the buyer is not obligated to take all the goods tendered, but may refuse to receive any installment. The seller failed to accept the offer and can recover only for the goods actually received and accepted. *Auto Spring Repairer Co. v. Mutual Auto Accessories Co.*, 72 Misc. 402, 130 N. Y. S. 140.

§ 127. DELIVERY TO A CARRIER ON BEHALF OF THE BUYER. 1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section one hundred, rule five, or unless a contrary intent appears.¹

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Effect of Section. The section is declaratory of the common law, unless the words "whether named by the buyer or not" in subsection 1 have made a slight change. See note below.

English Act. Section 32 of the Sale of Goods Act is

the equivalent of this section in substance. In *Harland v. Burstall*, 84 L. T. N. S. 324, it was held that delivery of 470 instead of 500 loads of timber to a carrier did not constitute performance of the contract and, the timber having been lost in transit, the buyer was allowed to sue the seller for breach of the contract.

¹ Delivery to a Carrier on Behalf of the Buyer. Delivery may be viewed from two points of view,—the passing of the property in the goods, and the performance of the seller's obligation under the contract. The question of the effect of delivery to a carrier upon the title in the goods has been considered under section 100, ante, and reference is here made to the cases there cited, since the questions involved are very similar.

"And when the delivery of the property is to be made by its shipment, delivery on board the vessel, as directed by the purchaser, will, in judgment of law, operate as a delivery to him or them." *Gutwillig v. Zuberbier*, 41 Hun 361, 363, 2 N. Y. St. Rep. 605. As expressing the doctrine of sub-section 1, see also *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Neumeyer v. Hooker*, 131 App. Div. 592, 116 N. Y. S. 204, affirmed 199 N. Y. 591, 93 N. E. 1126; *Moneyweight Scale Co. v. Loewenstein*, 103 N. Y. S. 80; *White v. Schweitzer*, 147 App. Div. 544.

Truckman.

But delivery to a truckman in the hire of the seller is not delivery to the buyer. *Grey v. Cary*, 9 Daly (N. Y.) 363. Nor does the section apply where the seller agrees to deliver at the buyer's place of residence. *Edward Thompson Co. v. Vacheron*, 69 Misc. 83, 125 N. Y. S. 939.

Delivery Excused.

Delivery to a carrier is excused where the carrier refuses to accept the goods for shipment and the buyer, on being informed of such refusal, states that he will make arrangements for shipment but delays unreasonably in doing so. *Mersereau v. L. K. Hirsch Co.*, 136 App. Div. 271, 121 N. Y. S. 11.

Right Quantity.

Delivery to a carrier must be of the right quantity, in order to fulfill the seller's obligation. *Bruce v. Pearson*, 3 Johns. (N. Y.) 534.

Carrier Specified.

Where the buyer directs that the goods be shipped by a particular
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carrier, the seller does not perform his contract by delivery to another carrier. *Iasigi v. Rosenstein*, 65 Hun 591, 20 N. Y. S. 491, reversed on another point in 141 N. Y. 414, 36 N. E. 509. See also *Corning v. Colt*, 5 Wend. (N. Y.) 253; *Hills v. Lynch*, 3 Robt. (N. Y.) 42. Apparently the Sales Act would allow performance of the contract by delivery to any carrier, even if the buyer had expressly prescribed the carrier to be used. If the words "whether named by the buyer or not" are given that meaning, they will result in a change of the common law. It is possible that they may be held to mean that delivery to a carrier is sufficient even though the buyer has not expressly made such carrier his agent, that is, has named no carrier at all.

Fitness for Transportation.

The seller does not fulfill his obligation to the buyer by mere delivery to the carrier, but must deliver the goods in condition fit for transportation. *Wilson v. Western Fruit Co.*, 11 Ind. 89; *Dickey v. Grant*, 6 Cow. (N. Y.) 310; *Gutwillig v. Zuberbier*, 41 Hun 361, 2 N. Y. St. Rep. 605.

"These paragraphs follow with slight changes section 32 of the English Act. (1) is familiar law. (2) and (3) are probably in accordance with the business usage, but there is little in the way of positive law on the subject. See *Chalmers* (5th ed.) p. 73." (Note of Commissioners on Uniform State Laws, *American Uniform Commercial Acts*, p. 99).

§ 128. RIGHT TO EXAMINE THE GOODS. 1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity to examine them for the purpose of ascertaining whether they are in conformity with the contract.¹

2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.²

3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.³

Effect of Section. The section is declaratory, except possibly as to the matters covered by sub-section 3, upon which the law seems not to be well settled. See note below.

English Act. The section is copied from section 34 of the Sale of Goods Act, except that sub-section 3 is not in the English act.

¹ **No Acceptance Until Opportunity to Inspect.** The doctrine of sub-section 1 is supported by *Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 U. S. (L. ed.) 339; *Alden v. Hart*, 161 Mass. 576, 37 N. E.

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742; Croninger v. Crocker, 62 N. Y. 151; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269; Harrison v. Scott, 203 N. Y. 369, 96 N. E. 755; Brand v. Weir, 27 Misc. 212, 57 N. Y. S. 731; Chapin v. Fitzgerald, 52 Hun 613, mem., 5 N. Y. S. 722. But the lack of opportunity to inspect is immaterial where no question is raised as to the quality of the goods. Gass v. Astoria Veneer Mills, 121 App. Div. 182, 105 N. Y. S. 794.

Time for Inspection.

The right of examination must be exercised within a reasonable time and what is a reasonable time is a question of fact. Mason v. Smith, 130 N. Y. 474, 29 N. E. 749; Boessneck v. Taylor, 46 Misc. 63, 91 N. Y. S. 360; E. T. Burrowes Co. v. Rapid Safety Filter Co., 49 Misc. 539, 97 N. Y. S. 1048. But the time of inspection may be limited by express contract, in which case obviously inspection and discovery of defects after the period of inspection has elapsed have no effect. Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660.

Place of Inspection.

As a general rule the place of delivery is the place of inspection and the buyer has no right to demand an inspection elsewhere. Upon this subject see Sawyer v. Dean, 114 N. Y. 469, 21 N. E. 1012; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; E. W. Bliss Co. v. U. S. Incandescent Gas Light Co., 149 N. Y. 300, 305, 306, 43 N. E. 859; Motley v. Elmenhorst, 142 App. Div. 830, 127 N. Y. S. 625; Pease v. Copp, 67 Barb. (N. Y.) 132.

Expense of Inspection.

"The law imposes upon the purchaser the duty of examining his purchases upon delivery, and I know of no law which permits him to charge to the vendor the time, trouble and expense involved in the discharge of that duty." Lifshitz v. McConnell, 80 App. Div. 289, 80 N. Y. S. 253. See also Lincoln v. Gallagher, 79 Me. 189, 8 Atl. 883; Silberman v. Clark, 96 N. Y. 522.

Use of Goods to Test.

The buyer may use a reasonable quantity of the goods to test them, even though the goods tested be thus destroyed, if the nature of the goods require such a test. Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881; Gerli v. Mistletoe Silk Mills, 80 N. J. L. 128, 76 Atl. 335 (decided under the Sales Act).

Inspection by Selected Person.

Where a contract provides that property is to be delivered subject to the inspection of B or other mutually satisfactory person, neither party has the right to demand inspection by any other person than

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B, unless B neglects or refuses to inspect, and this is true even though B is one of the sellers. *Dustan v. McAndrew*, 44 N. Y. 72.

Sales by Sample.

Where goods are shipped to the buyer and thereby the title passes to him, but he has the right of inspection to see whether they correspond with the sample, and the goods are destroyed before the inspection takes place, the loss falls on the buyer. *Wadhams v. Bal-four*, 32 Ore. 313, 51 Pac. 642.

² **Seller's Duty to Afford Inspection.** The elementary rule of sub-section 2 is supported by the following cases: *Croninger v. Crocker*, 62 N. Y. 151, 158, 159; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L.R.A. 702; *Dowdle v. Bayer*, 9 App. Div. 308, 41 N. Y. S. 184; *Plumb v. Bridge*, 128 App. Div. 651, 113 N. Y. S. 92, reported on second trial 142 App. Div. 154, 126 N. Y. S. 853; *McAfee v. Wyckoff*, 44 Misc. 380, 89 N. Y. S. 996.

³ **Right to Inspect in C. O. D. Sales.** The draftsman of the act says of this sub-section: "The right of inspection may, of course, be waived and the waiver may not be in express terms. * * * A common illustration of a bargain inconsistent with examination of the goods before payment is a contract by which goods are to be sent to the buyer C. O. D. It is the practice of the express companies not to permit examination before payment on such shipments. The contract must be assumed to have been made with this practice in mind. Accordingly there is no right of inspection." (*Williston on Sales*, p. 839).

The Commissioners on Uniform State Laws make the following note upon this section: "Section 47 (1) and (2) follow section 34 of the English Act, and state the American law also. *Mechem*, § 1375 *et seq.* Sub-section (3) is new. It states the actual practice of the large express companies and probably states the existing law. *Wiltse v. Barnes*, 46 Ia. 210." (30 Am. Bar Assoc. Rep. 373, 374.)

New York View.

"Under an ordinary executory contract for the sale of goods to be delivered by the seller to the buyer at a distant point, although for cash on delivery, the buyer has the right of inspection and the seller must accord him reasonable opportunity to inspect before he is bound to accept." Dictum in *Plumb v. J. W. Hallauer, etc., Co.*, 145 App. Div. 20, 25, 130 N. Y. S. 147. There is no right of inspection where the seller reserves the right of possession by means of a draft with bill of lading attached. *Whitney v. McLean*, 4 App. Div. 449, 38 N. Y. S. 793. "When the agreement of purchase is that the buyer will pay the purchase price by sight draft to be attached to the

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bill of lading, he is not entitled to an inspection of the property before paying the draft, and he cannot refuse to accept the property because such inspection is refused." *Plumb v. J. W. Hallauer, etc., Co.*, 145 App. Div. 20, 26, 130 N. Y. S. 147. See also *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566. The point seems not to have been squarely decided in this state.

§ 129. WHAT CONSTITUTES ACCEPTANCE.

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.¹

Effect of Section. The section is declaratory of the common law. See note below.

English Act. The American section is copied from section 35 of the Sale of Goods Act. In *Mechan v. Bow*, [1910] Sc. Ct. Sess. 758, it was held that where a firm of engineers contract to supply two feed-tanks to a firm of shipbuilders, for a tug which the latter is building under contract for the Admiralty, and the tanks are to be made "to British Admiralty latest tests and requirements," and they are delivered and fitted into the tug by the shipbuilders, they are accepted within the meaning of this section, by reason of the acts of the buyer inconsistent with the ownership of the sellers, notwithstanding that the tanks had not been made up to Admiralty tests.

¹**What Constitutes Acceptance.** "It is elementary that acceptance is the receipt of anything offered by another, with the intention to retain it, indicated by some act sufficient for that purpose, as when the seller gives the buyer the actual control of the goods and the buyer accepts. There must be, however, some act or conduct on the buyer's part manifesting his intention to accept the goods unconditionally and in full performance of the contract of sale." *Brown v. Bard*, 64 Misc. 249, 256, 118 N. Y. S. 371.

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Gerli v. Mistletoe Silk Mills, 80 N. J. L. 128, 76 Atl. 335, is a case decided under the Sales Act and referring to this section.

Acceptance by Acts.

The following cases support the statement that there may be acceptance by acts inconsistent with ownership in the seller: Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707 (use of machines for five months); Hospital Supply Co. v. O'Neill, 10 Misc. 655, 31 N. Y. S. 792, affirmed 155 N. Y. 634, 49 N. E. 1098 (refusal to approve coupled with use); Brown v. Foster, 108 N. Y. 387, 15 N. E. 608 (use of machinery for three months); Powell v. Morrell, 121 N. Y. S. 225 (suit of clothes worn thirty days); Richardson v. Levi, 69 Hun 432, 22 N. Y. S. 352 (resale of goods); Kienle v. Klingman, 24 Misc. 708, 53 N. Y. S. 788 (resale of goods); Warden v. Marshall, 99 Mass. 305 (resale); Wolf v. Dietzsch, 75 Ill. 205 (resale of part); Bascom v. Danville Stove, etc., Co., 182 Pa. St. 427, 38 Atl. 510 (alteration of goods).

Acceptance by Retention.

The following cases illustrate the rule that mere retention may show acceptance, after the lapse of a reasonable time; Mason v. Smith, 130 N. Y. 474, 29 N. E. 749; St. Dunstan Soc. v. Picard, 115 N. Y. S. 1079; Ellison v. Creed, 34 App. Div. 15, 53 N. Y. S. 1054; Geiser Mfg. Co. v. Taylor, 55 App. Div. 638, 67 N. Y. S. 30.

Illustrative Cases.

The following cases present various phases of the question of acceptance: Wegner Mach. Co. v. Taylor, 143 App. Div. 704, 128 N. Y. S. 309 (retention eight days beyond trial period; question for jury); Motley v. Elmenhorst, 142 App. Div. 830, 127 N. Y. S. 625 (delivery to buyer's ship does not always show acceptance); Wilson v. Rushville Min. etc., Co., 142 App. Div. 297, 126 N. Y. S. 830 (no acceptance where delivery is forced on buyer); Harrison v. Scott, 135 App. Div. 546, 120 N. Y. S. 377 (chattel mortgaging of goods does not conclusively show acceptance, where there has been no opportunity for inspection); Tompkins v. Lamb, 121 App. Div. 367, 106 N. Y. S. 6 (concealed defect); Van Pub. Co. v. Westinghouse, 72 App. Div. 121, 76 N. Y. S. 340 (acceptance, relying on seller's promise to make goods satisfactory); Altschul v. Koven, 94 N. Y. S. 558 (payment after discovery of defect); White v. Schweitzer, 147 App. Div. 544 (resale by buyer for seller; no acceptance).

Acceptance sufficient to satisfy the buyer's duty and to pass the property in the goods should not be confused with acceptance sufficient to make a contract enforceable under the Statute of Frauds. For cases upon the latter subject, see notes to sec. 85, ante.

§ 130. ACCEPTANCE DOES NOT BAR ACTION FOR DAMAGES. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor.¹

Effect of Section. This section in conjunction with section 150, post, works an important change in the law of warranty in New York. At common law implied warranties were extinguished by acceptance, and only express warranties survived acceptance. This section, in connection with section 150, provides that acceptance does not extinguish a warranty of any kind. It seems likely also that the last sentence of the section is an innovation in New York law. See note below.

English Act. "This section is not contained in the English Act, but section 11 (1) (a) of that act seems to authorize the buyer to accept goods and nevertheless hold the seller liable in damages." (Note of Commissioners on Uniform State Laws, American Uniform Commercial Acts, p. 101).

¹**Effect of Acceptance.** The seller's breach of duty may have consisted in (1) failure to deliver the right quantity of goods, (2) failure to deliver the goods on time, (3) failure to deliver the proper quality of goods.

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Insufficient Quantity.

Where the seller fails to deliver the contract quantity of goods and the buyer accepts the part delivered, he nevertheless has an action for the breach of the contract caused by the delivery of an insufficient quantity. *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Kipp v. Meyer*, 5 Hun (N. Y.) 111; *Visscher v. Greenbank Alkali Co.*, 11 Hun (N. Y.) 159.

Late Delivery.

The buyer may recover damages caused by delay in delivery, although the buyer accepts the late delivery. *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 App. Div. 568, 88 N. Y. S. 412, 94 N. Y. S. 23; *Chapman v. Fowler*, 132 App. Div. 250, 116 N. Y. S. 962; *Raymore Realty Co. v. Pfothenauer-Nesbit Co.*, 145 App. Div. 163, 129 N. Y. S. 1002; *Jones v. National Printing Co.*, 13 Daly (N. Y.) 92. But see the following cases as to the situation where the buyer makes no complaint when receiving the late delivery: *Roby v. Reynolds*, 65 Hun 486, 20 N. Y. S. 386; *E. T. Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. S. 1048; *Bock v. Healy*, 8 Daly (N. Y.) 156.

Defects in Quality.

The question of the effect of acceptance on the breach of the seller's obligation as to quality is summed up in the following late judicial expression: "I deduce from the foregoing that the following propositions are authoritatively settled in this State, viz.: That mere words of description in an executory contract of sale do not amount to a warranty, and that for a variance between the article delivered and the article described, the remedy is for breach of the contract of sale and does not survive acceptance of the goods where the defects are patent; likewise that warranties which the law implies as exceptions to the rule *caveat emptor* do not survive acceptance where the defects are patent; but that in the case of express warranties, whether the sale be executed or executory, retention of the goods after opportunity for inspection or even after knowledge of the defects does not bar an action for breach of warranty." *Staiger v. Soht*, 116 App. Div. 874, 879, 102 N. Y. S. 342, affirmed 191 N. Y. 527, 84 N. E. 1120.

Implied Warranty Did Not Survive at Common Law.

The implied warranty, or condition, that the goods should correspond with the description of them in the contract of sale did not, at common law, survive acceptance of the goods, unless the defects were latent. *Richardson v. Levi*, 69 Hun 432, 22 N. Y. S. 352; *Lifshitz v. McConnell*, 80 App. Div. 289, 80 N. Y. S. 253; *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 App. Div. 187, 87 N. Y. S. 41, affirmed 181

N. Y. 573, 74 N. E. 1118; McAfee v. Dix, 101 App. Div. 71, 91 N. Y. S. 464; E. T. Burrowes Co. v. Rapid Safety Filter Co., 49 Misc. 539, 97 N. Y. S. 1048; McCormick v. Sarson, 45 N. Y. 265, 6 Am. Rep. 80; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 235; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 649; Waeber v. Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712; Smith v. Coe, 170 N. Y. 162, 63 N. E. 57; Casselli v. Mosso, 90 N. Y. S. 371; Levy v. Kornreich, 121 N. Y. S. 346. See also League Cycle Co. v. Abrahams, 27 Misc. 548, 58 N. Y. S. 306; Hano v. Simons, 92 N. Y. S. 337. These cases are no longer law upon this point, for the Sales Act makes the obligation an implied warranty and provides that all warranties survive acceptance of the goods.

Express Warranty Survived at Common Law.

On the other hand there are numerous decisions that an express warranty of quality survives acceptance and retention of the goods. Waring v. Mason, 18 Wend. (N. Y.) 425; Nichols v. Townsend, 7 Hun (N. Y.) 375; Marshuetz v. McGreevy, 23 Hun (N. Y.) 408; McCormick Harvesting Mach. Co. v. Warfield, 33 App. Div. 513, 53 N. Y. S. 737; McCarthy v. Ellers, 107 App. Div. 219, 94 N. Y. S. 1109; Isbell-Porter Co. v. Heinman, 113 App. Div. 79, 98 N. Y. S. 1018; Macrea v. Gotham Rubber Co., 113 App. Div. 455, 99 N. Y. S. 373; Norwich Light Co. v. Ames, 122 App. Div. 319, 106 N. Y. S. 952; Golding v. Russell, 131 App. Div. 540, 115 N. Y. S. 359; Bedford v. Hol-Tan Co., 143 App. Div. 372, 128 N. Y. S. 578; Rust v. Eckler, 41 N. Y. 488; Conor v. Dempsey, 49 N. Y. 665; Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719; Parks v. Morris Ax, etc., Co., 54 N. Y. 586; Dounce v. Dow, 57 N. Y. 16; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Hooper v. Story, 155 N. Y. 171, 49 N. E. 773; Mathes v. McCarthy, 195 N. Y. 40, 88 N. E. 768; Levis v. Pope Motor Car Co., 202 N. Y. 402, 95 N. E. 815; Ferguson v. Netter, 204 N. Y. 505; Bernstein v. Loomis, 87 N. Y. S. 134; Ralph B. Carter Co. v. Fischer, 121 N. Y. S. 614. These cases are obviously not affected by the Sales Act upon this point, since all warranties, express and implied, survive acceptance under that statute.

Sale by Sample.

At common law a sale by sample was considered a sale upon express warranty and the obligation of the seller survived acceptance of the goods. Smith v. Foote, 81 Hun 128, 30 N. Y. S. 679; Staiger v. Soht, 116 App. Div. 874, 102 N. Y. S. 342, affirmed 191 N. Y. 527, 84 N. E. 1120; Larowe Milling Co. v. Lyons Beet Sugar Refining Co., 137 App. Div. 732, 122 N. Y. S. 567; Kent v. Friedman, 101 N.

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Y. 616, 3 N. E. 905; *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. 1006; *Henry v. Talcott*, 175 N. Y. 385, 67 N. E. 617. But see *Hardt v. Western Electric Co.*, 84 App. Div. 249, 82 N. Y. S. 835. These cases are not affected by the statute, although the warranty on a sale by sample is made an implied warranty by the Sales Act, because under the act both express and implied warranties survive. See section 97, ante.

Where a limited period of inspection is set, no warranty survives that period. *Gentili v. Starace*, 133 N. Y. 140, 30 N. E. 660.

Warranty of Merchantability Did Not Survive.

The implied warranty of merchantability did not survive acceptance at common law. *Dounce v. Dow*, 64 N. Y. 411, 416; *Tichnor v. Barley*, 72 Misc. 638, 132 N. Y. S. 243; *Sprague v. Blake*, 20 Wend. (N. Y.) 61. These cases are affected by the act, because all warranties survive under the act.

Fitness for Purpose.

Nor did the manufacturer's implied warranty of fitness for a particular purpose survive acceptance of the goods. *Durbrow, etc., Mfg. Co. v. Cuming*, 35 App. Div. 376, 54 N. Y. S. 818; *Cooper v. Payne*, 103 App. Div. 118, 93 N. Y. S. 69, reversed on another point, 186 N. Y. 334, 78 N. E. 1076. Obviously these cases do not accord with the Sales Act.

Partial Acceptance.

A partial acceptance of the goods seems to have defeated the warranty as to the entire lot. *Simon v. Wood*, 17 Misc. 607, 40 N. Y. S. 675; *H. Herrmann Lumber Co. v. Heidelberg*, 46 Misc. 465, 92 N. Y. S. 256. These cases are rendered obsolete by the Sales Act.

Payment is ordinarily equivalent to an acceptance of the goods, but the contract may provide that payments shall be made in advance of delivery and before acceptance. *Pierson v. Crooks*, 115 N. Y. 539, 552, 22 N. E. 349, 12 Am. St. Rep. 831.

Peculiar New York Doctrines.

It was a peculiar doctrine of the New York common law that an express warranty, if no broader than the law would have implied in the absence of express agreement, did not survive acceptance of the goods. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Heath Dry Gas Co. v. Hurd*, 193 N. Y. 255, 86 N. E. 18. This doctrine, of course, is done away with by the Sales Act because of the provision that all warranties survive acceptance.

A few cases seem to make the question of survival or extinguishment of a warranty depend upon the question whether the contract

of sale to which the warranty was attached was executory or executed. If it was executory, no warranty survived acceptance; and if executed, a warranty did survive acceptance. *Hargous v. Stone*, 5 N. Y. 73, 86, 87; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, 519; *Plumb v. J. W. Hallauer, etc., Co.*, 145 App. Div. 20, 130 N. Y. S. 147; *Stuart v. Manhattan Bath Tub Co.*, 34 Misc. 165, 68 N. Y. S. 816. But other cases seem to take a contrary view. "But when there is an express warranty it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory, as in a present sale." *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 268, 23 N. E. 372, 16 Am. St. Rep. 753. See also *Day v. Pool*, 52 N. Y. 416, 421, 11 Am. Rep. 719. The doctrine above referred to is obviously overturned by the Sales Act, which makes all warranties survive acceptance.

Certain other cases have seemed to make the standard of survival the intent of the parties, and have said that warranties survived if they were intended to survive. See *Norton v. Dreyfuss*, 106 N. Y. 90, 94, 12 N. E. 428; *Studer v. Bleistein*, 115 N. Y. 316, 325, 22 N. E. 243, 5 L.R.A. 702; *Bull v. Bath Iron Works*, 75 App. Div. 380, 384, 78 N. Y. S. 181; *James v. Libby*, 44 Misc. 210, 88 N. Y. S. 812. This criterion is obviously not to be used in this state since the passage of the Sales Act.

Latent Defects.

If the defects in the goods were latent, acceptance of them did not extinguish the warranty at common law. *Gautier v. Douglass Mfg. Co.*, 13 Hun (N. Y.) 514; *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. S. 34; *Depew v. Peck Hardware Co.*, 121 App. Div. 28, 105 N. Y. S. 390, affirmed 197 N. Y. 528, 90 N. E. 1158; *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 136 App. Div. 22, 120 N. Y. S. 163; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Gurney v. Atlantic, etc., R. Co.*, 58 N. Y. 358; *Carleton v. Lombard*, 149 N. Y. 137, 44 N. E. 422; *League Cycle Co. v. Abrahams*, 27 Misc. 548, 58 N. Y. S. 306; *White Mfg. Co. v. La Vergne Refrigerating Mach. Co.*, 84 N. Y. S. 192. Under the Sales Act the question whether the defect is latent or patent has no effect upon the *survival* of the warranty after acceptance.

Specific Objection; Others Excluded.

"When the refusal to accept purchased goods is based upon particular objection, formulated and deliberately stated, all other objections are deemed waived, and the vendor to recover the price need only prove compliance with the contract of sale in the particulars

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covered by the stated objections." *Hess v. Kaufherr*, 128 App. Div. 526, 527, 112 N. Y. S. 832. See also *Littlejohn v. Shaw*, 159 N. Y. 188, 191, 53 N. E. 810; *Brown v. Bard*, 64 Misc. 249, 118 N. Y. S. 371; *American Case, etc., Co. v. Griswold*, 68 Misc. 379, 125 N. Y. S. 4. The rule is the same in regard to contracts concerning land. *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287; *Benson v. Cromwell*, 6 Abb. Pr. (N. Y.) 83. But not in cases between master and servant where one ground of discharge has been given. *Green v. Edgar*, 21 Hun (N. Y.) 414; *Arkush v. Hanan*, 60 Hun 518, 15 N. Y. S. 219. *Necessity of Notice to Seller.*

In referring to the last sentence of section 130, the draftsman of the act says: "The latter part of the American section imposes a qualification of the buyer's rights which is justified by business practice and by some decisions as well as by the law on the Continent of Europe." (Williston on Sales, pp. 846-847). In discussing this question the court in *Muller v. Eno*, 14 N. Y. 597, 602, says: "He [the buyer] may, in all cases, unless he has specially agreed otherwise, affirm the sale and bring his action for damages on the warranty. So, in an action against him for the price of the goods, he has the same right by way of recoupment; and such is the theory of the defence in the present case. The defendants do not disaffirm the contract, but propose to enforce it by claiming damages for its non-performance; and where the action or defence proceeds upon such a ground the claim is not barred by the continued possession of the goods, by circumstances of delay in giving notice to the vendor, nor even by omitting altogether to give such notice and using or selling the property. * * * The omission of the purchaser to give notice or to make complaint, and the manner in which he deals with the goods, may furnish strong presumptions against him upon the question whether the warranty is in fact broken, and in regard to the amount of the injury he has sustained. But this is a very different thing from saying that the law absolutely deprives him of relief." See also *Brigg v. Hilton*, 99 N. Y. 517, 528, 3 N. E. 51, 52 Am. Rep. 63. But see *Dowdle v. Bayer*, 9 App. Div. 308, 310, 41 N. Y. S. 184. The Sales Act seems to place upon the buyer a duty not recognized by the common law.

For a further discussion of the subject of the buyer's rights upon a breach of warranty, see section 150, post, and notes thereto.

Jurisdictions Supporting the Section.

The rule laid down in section 130 is law in a number of American jurisdictions. *English v. Spokane Commission Co.*, 48 Fed. 196; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976; *Northwestern Cordage Co. v. Rice*, 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563.

§ 131. BUYER IS NOT BOUND TO RETURN GOODS WRONGLY DELIVERED. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.¹

Effect of Section. This section is declaratory of the common law.

English Act. This section follows section 36 of the Sale of Goods Act. Mr. Chalmers, the draftsman of the English act, makes the following note regarding this section: "The buyer, says Lord Esher, may return the goods or offer to return them, if not according to contract; but it is sufficient to signify his rejection of them by stating that they are not according to contract, and that they are at the vendor's risk. No particular form is essential. It is sufficient if he does any unequivocal act shewing that he rejects them." (Sale of Goods Act, 1893, p. 74).

¹ **Buyer is Not Bound to Return Goods Wrongly Delivered.** This seems to have been the theory of the New York common law. Thus in *Reed v. Randall*, 29 N. Y. 358, 363, 86 Am. Dec. 305, it is said that "if the thing purchased is found on examination to be unsound, or not to answer the order given for it, he [the buyer] must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract or he will be presumed to have acquiesced in its quality." See also *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 236, 15 N. E. 335; *Wilson v. Rushville Min. etc., Co.*, 142 App. Div. 297, 126 N. Y. S. 830; *Lamb v. Traitel*, 12 Misc. 140, 32 N. Y. S. 1075.

Other Jurisdictions.

The decisions in other jurisdictions are also to the effect that mere notice of refusal to accept is sufficient to put the goods at the seller's

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risk. *Grimoldby v. Wells*, L. R. 10 C. P. (Eng.) 391; *Doane v. Dunham*, 79 Ill. 131, 134; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Dailey v. Green*, 15 Pa. St. 118; *Exhaust Ventilator Co. v. Chicago, etc., R. Co.*, 66 Wis. 218, 28 N. W. 243.

§ 132. BUYER'S LIABILITY FOR FAILING TO ACCEPT DELIVERY. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.¹

Effect of Section. The section is declaratory of the common law.

English Act. Section 37 of the Sale of Goods Act is the model from which this section has been drafted. The last sentence is changed somewhat.

¹**Buyer's Liability for Failure to Accept Delivery.** In *Dibble v Corbett*, 5 Bosw. (N. Y.) 202, the seller sued the buyer for damages caused by refusal to accept the goods on August 5th, the buyer having accepted on the 15th. The court said: "It is perfectly settled that it is the duty of the vendee to take the goods within a reasonable time, or he will be liable to the vendor for warehouse rent and other expenses growing out of the custody of them, or even to an action for not removing them in case the seller is prejudiced by his delay. (Story on Sales, § 404)." (p. 211).

The draftsman of the act says of this section: "If a breach of contract, whether due to delay in performance or any other cause, is so slight as not to justify a refusal of the injured party to continue with the contract, it is clear that his damages must be calculated on the basis of the injury caused by the delay or defect only. Again,

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it often happens that though a delay has taken place which would justify the injured party in refusing to continue under the contract, both parties in fact continue to perform. It is for such cases that section 51 of the Sales Act provides." (Williston on Sales, p. 869).

"If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them, should he be prejudiced by the delay." Lord Ellenborough in *Greaves v. Ashlin*, 3 Campb. (Eng.) 426, 427.

The seller's remedies where the breach amounts to a repudiation or breach of the entire contract are described in section 145, *post*. See *Canda v. Wick*, 100 N. Y. 127, 2 N. E. 381, for a case of repudiation by refusal to accept.

PART IV.
**RIGHTS OF UNPAID SELLER AGAINST
THE GOODS.**

CHAPTER XI.

UNPAID SELLER'S LIEN.

§ 133. DEFINITION OF UNPAID SELLER. 1. The seller of goods is deemed to be an unpaid seller within the meaning of this article

(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

2. In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.¹

Effect of Section. The section is believed to be declaratory of the common law. See note below.

English Act. This section is the substantial equivalent of section 38 of the Sale of Goods Act.

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Definition of Unpaid Seller.

¹ Definition of Unpaid Seller. Illustrative Cases. The definition here given is believed to be that acted upon in the following cases: *Harris v. Pratt*, 17 N. Y. 249; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Becker v. Hallgarten*, 86 N. Y. 167; *Buckley v. Furniss*, 17 Wend. (N. Y.) 504; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93.

In *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348, the buyer gave notes for the price and later became insolvent. The rights of an unpaid vendor were given to the seller, thus illustrating the definition given in sub-section 1 (b) above.

A person electing to consider a conversion of goods a sale is not an unpaid vendor. *Thacher v. Hannahs*, 4 Robt. (N. Y.) 407.

Definition of Insolvency.

"A person is insolvent within the meaning of this article who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not." (sec. 156, post.)

"Permitting commercial paper to be dishonored by one engaged in commerce, and his property to be attached in an action in which judgment is subsequently recovered by default, is evidence, and if unexplained, is proof of insolvency." *Tuthill v. Skidmore*, 124 N. Y. 148, 153, 26 N. E. 348. Proof that judgments have been recovered against the buyer, without proof that they cannot be collected, and proof that the buyer has practically vacated the place of business which he occupied at the time of the sale, does not show insolvency. *Talcott v. Salke*, 9 Daly (N. Y.) 154.

When Is Seller Unpaid?

Where a seller sends drafts for the price to the buyer's agent, with bills of lading attached, and the agent accepts the drafts, such acceptance is not payment so as to prevent the stoppage of the goods *in transitu*, when the drafts are never actually paid and the buyer later becomes insolvent. *Ainis v. Ayres*, 62 Hun 376, 16 N. Y. S. 905. Where a seller takes notes in payment of the price and assigns the notes to third parties, the unpaid seller's lien passes with the notes to the transferees thereof. *Johnson v. Dickinson*, 78 N. Y. 42.

Quasi-Unpaid Vendors.

Sub-section 2 states doctrine that has been recognized by the courts of this state. "The reasons which permit the unpaid vendor of goods to stop them *in transitu* upon the happening of the insolvency of the vendee apply with equal force to the factor who has a lien for advances upon his principal's goods. (*Muller v. Pondir*, 55 N. Y. 325.)

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If delivery may be recalled upon insolvency, much more may it be refused." *Hollins v. Hubbard*, 165 N. Y. 534, 542, 59 N. E. 317. Thus in *Gossler v. Schepeler*, 5 Daly (N. Y.) 476, it was held that the right of stoppage *in transitu* was open to a person who had paid the price of goods for the buyer and taken from him an assignment of the bill of lading as security for his advances.

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Remedies of an Unpaid Seller.

§ 134. REMEDIES OF AN UNPAID SELLER.

1. Subject to the provisions of this article, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such has

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of resale as limited by this article;

(d) A right to rescind the sale as limited by this article.

2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.¹

Effect of Section. The section is declaratory of the pre-existing law. It merely outlines the remedies later amplified in sections 135 to 143, inclusive.

English Act. The American section follows closely section 39 of the Sale of Goods Act, except that sub-section 1 (d) is not contained in the English act.

¹**Remedies of an Unpaid Seller.** Since this section is merely a summary of the four remedies more fully treated in the following sections, discussion of those remedies has been condensed under the later sections. Thus, matter relating to sub-section 1 (a) will be found under sections 135 to 137, inclusive, post; matter relating to sub-section 1 (b) is placed under section 138 to 140, inclusive, and section 143, post; sub-section 1 (c) is treated under section 141, post; and sub-section 1 (d) is discussed under section 142, post.

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If the property in the goods has not passed to the buyer, the situation which is assumed in sub-section 2, then obviously the seller has no lien, for the goods are his own, and a man cannot have a lien on his own property. His remedies then are for breach of the contract. See sections 144 to 151, post. But obviously a man may retain possession of his own goods, and so sub-section 2 states,

§ 135. WHEN RIGHT OF LIEN MAY BE EXERCISED. 1. Subject to the provisions of this article, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.¹

Effect of Section. The section is declaratory of the common law. See note below.

English Act. Section 41 of the Sale of Goods Act is copied into the American section above.

¹ **When Right of Lien May Be Exercised.** The rules of the section, although never brought together and clearly formulated as here, are acted upon in the cases cited below. "When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu*, or retains them before *transitus* has begun, he can, by a sale, made on notice to the vendee, vest a purchaser with a good title. (*Dustan v. McAndrew*, 44 N. Y. 72.) His right is very nearly that of a pledgee, with power to sell at private sale in case of default. * * * The vendee having become insolvent and refused payment of the notes given for the purchase-

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When Lien May Be Enforced.

price of the property which remained in the vendor's possession, his right to retain it as security for the price was revived as against the vendee and his attaching creditor." *Tuthill v. Skidmore*, 124 N. Y. 148, 153, 154, 26 N. E. 348. For further discussions of this lien, see *Cross v. O'Donnell*, 44 N. Y. 661, 665, 666, 4 Am. Rep. 721; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 76, 35 N. E. 415; *Petrie v. Stark*, 79 Hun 550, 29 N. Y. S. 881.

"The vendor of personal property may retain the possession, even after a sale sufficient to pass the title, if the purchase money has not been paid and no credit has been given for it. This he does by virtue of the vendor's lien." *Carlisle v. Kinney*, 66 Barb. (N. Y.) 363, 365. This is the rule of sub-section 1 (a).

Sales on Credit.

Where goods have been sold on credit, the seller's lien does not attach during the period of credit and the buyer may demand possession of the goods, but if the period of credit expires and the price is not paid and the goods are still in the seller's possession, the seller's lien revives and attaches to the goods. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232. See also *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348. This is the rule of sub-section 1 (b).

Insolvency.

Insolvency entitles the seller to exercise his right of lien, regardless of whether the term of credit has expired. *Hamburger v. Rodman*, 9 Daly (N. Y.) 93; *Benedict v. Field*, 16 N. Y. 595, 598, 599; *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348. This is the rule of sub-section 1 (c).

Seller Buyer's Bailee.

The mere fact that the seller holds the goods as bailee for the buyer, without any change of possession, does not prevent an assertion of the seller's lien. The important fact is possession, not the manner of obtaining or retaining it. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232.

Equitable Rights in Seller.

Where a seller delivers goods to a buyer on condition that he execute a chattel mortgage on the goods for the price, and the buyer fails to give this mortgage, the seller has an equitable lien on the property as against the buyer and all persons claiming under him except *bona fide* purchasers having no notice of the lien. *Husted v. Ingraham*, 75 N. Y. 251. So where property is delivered to a buyer under a contract calling for the payment of the price by note, and the note is not given, the buyer holds the property as trustee for the

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When Lien May Be Enforced.

seller. *Osborn v. Gantz*, 60 N. Y. 540; *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437. The rights said to exist in these cases are similar to but not identical with the unpaid seller's lien, for they exist although the seller has given up possession.

Miscellaneous Cases.

It is obvious that an unpaid seller under a conditional sale does not have a lien or the rights that go with it. A man cannot have a lien on his own property. *Earle v. Robinson*, 91 Hun 363, 36 N. Y. S. 178, affirmed 157 N. Y. 683, 51 N. E. 1090. A person who has elected to consider a conversion a sale does not thereby acquire a lien on goods of the convertor which he holds as agent for sale. The seller's lien does not extend to goods other than those sold, nor is the person electing to consider a conversion as a sale an unpaid vendor. *Thacher v. Hannahs*, 4 Robt. (N. Y.) 407.

Obviously the seller's lien exists where the goods are in the possession of an agent of the seller, as well as when in his own possession. *Morey v. Medbury*, 10 Hun (N. Y.) 540.

§ 136.

Lien after Part Delivery.

§ 136. LIEN AFTER PART DELIVERY. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.¹

Effect of Section. The section is declaratory of the common law.

English Act. This section follows section 42 of the Sale of Goods Act exactly.

¹**Lien After Part Delivery.** "In the present case there was a partial delivery of the property upon Miller & Sons' verbal order to the plaintiff; but as was held in the cases already cited, * * * that did not prevent the defendant's lien reviving upon the subsequent insolvency of Miller & Sons, and attaching to the residue of the logs remaining in their custody. A partial payment of the price, or the delivery of a part of the goods to the vendee, does not, if the goods, or any part of them, remain in the custody of the vendor, prevent his lien for the price attaching to the goods, * * *." Daly, J., in *Hamburger v. Rodman*, 9 Daly (N. Y.) 93, 99. And so in *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467, it was held that a sawyer's lien on boards, after the delivery of a portion of them, might be enforced to the extent of the whole amount due, against the balance of the boards in his possession. Although the point has not been discussed frequently, apparently the section states the common law rule

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When Lien Is Lost.

§ 137. WHEN LIEN IS LOST. 1. The unpaid seller of goods loses his lien thereon

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.¹

Effect of Section. This section is believed to declare the common law.

English Act. This section is the substantial equivalent of section 43 of the Sale of Goods Act. In *Poulton v. Anglo-American Oil Co.*, 27 Times L. Rep. 38, it was held that, where three boilers were sold by a paper company to the plaintiffs and the plaintiffs sold them to H., who resold them to the defendant, and the boilers remained in the possession of the paper company, the original seller, throughout the entire transaction, the plaintiffs had not lost their unpaid seller's lien against H., even though they had informed the paper company of the sale to H. There was no attornment by the paper company to anyone except the plaintiffs.

¹ **When Lien Is Lost.** If the goods are delivered to a carrier or other bailee as specified in sub-section 1 (a), the lien proper is divested, but the right of stoppage *in transitu*, of course, continues.

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When Lien Is Lost.

Concerning that right see sections 138 to 140, post. See section 101, ante, regarding the reservation of the property or right to the possession of the goods.

Delivery.

"A vendor's lien is lost by an unconditional delivery to the purchaser of the goods which are the subject of the sale." *A. F. Englehardt Co. v. Benjamin*, 5 App. Div. 475, 478, 39 N. Y. S. 31; *Lupin v. Marie*, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256; *Blossom v. Champion*, 28 Barb. (N. Y.) 217. A sawyer's lien for his work done is lost when the boards are taken half a mile from the mill and placed on the bank of a canal. Even though the lien is expressly reserved as between the sawyer and the owner of the boards, it cannot affect the rights of third persons. *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467.

Doubtless a mere delivery of the goods to the buyer for the purpose of an examination would not amount to such a delivery as to constitute a waiver of the seller's lien. *Leven v. Smith*, 1 Den. (N. Y.) 571. Where delivery is a process occupying considerable time, as in the case of lumber to be taken from rafts, the seller may assert his lien at any time before delivery is complete. In this case most of the lumber had been piled on the dock of a pledgee from the buyer. The seller had no right to demand payment until all was delivered. *Palmer v. Hand*, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392.

Waiver.

The following cases illustrate some of the ways in which the seller's lien may be waived: *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348 (not waived by allegation in pleading that goods were property of seller, combined with allegation of a lien, when facts are admitted and only inconsistency is in the legal conclusion to be drawn from the facts); *Hudson v. Swan*, 83 N. Y. 552 (claim of ownership); *Johnson v. Dickinson*, 78 N. Y. 42 (accepting dividend in bankruptcy); *Maynard v. Anderson*, 54 N. Y. 641 (claim of ownership); *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232 (renewal of notes given for price); *Reuscher v. Klein*, 35 Super. Ct. (N. Y.) 446 (consenting to a sale by buyer to third person); *Hunn v. Bowne*, 2 Cai. (N. Y.) 38 (showing goods to a sub-purchaser of the buyer as goods of the buyer).

Acts of waiver occurring after the commencement of the action will not prevent the insistence by the seller on the vendor's lien. *Carlisle v. Kinney*, 66 Barb. (N. Y.) 363.

CHAPTER XII.

STOPPAGE IN TRANSITU.

§ 138. **SELLER MAY STOP GOODS ON BUYER'S INSOLVENCY.** Subject to the provisions of this article, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.¹

Effect of Section. The section is believed to declare the common law.

English Act. This section is the substantial equivalent of section 44 of the Sale of Goods Act.

¹ **Seller May Stop Goods on Buyer's Insolvency.** "The vendor, in the case of a sale on credit, may resume the possession of the goods while they are in the hands of a carrier or middle-man, in their transit to the consignee or vendee, on his becoming bankrupt or insolvent." *Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 141, 17 Wend. (N. Y.) 504. "The right of the vendor to resume the possession of goods sold on credit, in case of the insolvency of the consignee, before they come to his hands, does not depend upon any condition, or other peculiarity in the contract of sale, but proceeds on the ground of an equitable lien." *id.* 142, 143.

Origin of Right.

"The right to retain the goods, or to stop them in transitu, upon the insolvency of the vendee, is an equitable right founded on princi-

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Seller's Right of Stoppage.

ples of natural justice (*Withers v. Lys*, Holt N. P. 20, note). Lord Hardwick said, in *Snee v. Prescott*, 1 Atk. 250, that if, after the buyer has stopped payment, the vendor gets the goods back again by any means short of stealing them, it would be inequitable to take them from him." Daly, J., in *Hamburger v. Rodman*, 9 Daly (N. Y.) 93, 96. For other discussions of this right which support the definition of it given in the above section of the act, see *Hunn v. Bowne*, 2 Cai. (N. Y.) 38, 42; *Oppenheimer v. Wells*, 55 Misc. 385, 386, 106 N. Y. S. 547; *Gossler v. Schepeler*, 5 Daly (N. Y.) 476, 479; *Lupin v. Marie*, 6 Wend. (N. Y.) 77, 84, 21 Am. Dec. 256; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Babcock v. Bonnell*, 80 N. Y. 244.

Time of Insolvency.

The right of stoppage exists when the seller *discovers* insolvency during transit, and it is immaterial when the insolvency arose. *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658, 663. But if the seller had full knowledge of the buyer's insolvency at the time of the sale, he has no right of stoppage. *Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 17 Wend. (N. Y.) 504.

Credit Need Not Have Expired.

The right of stoppage exists whether the term of credit has expired or not, if the buyer becomes insolvent. *Mottram v. Heyer*, 5 Den. (N. Y.) 629. A complaint relying on the right of stoppage but failing to allege that the buyer was insolvent is demurrable. *Oppenheimer v. Wells*, 55 Misc. 385, 106 N. Y. S. 547.

Definition of Insolvency.

"Strict proof of insolvency is not required in order to justify the exercise of the right of stoppage *in transitu*. 'By the word "insolvency" is meant a general inability to pay one's debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence.' Benj. Sales, § 837; *Smith Merc. Law*, 550, and note." *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 256, 67 N. W. 424, 33 L.R.A. 351, 57 Am. St. Rep. 919. See also *Hays v. Mouille*, 14 Pa. St. 48, 51. Thus where the buyer had assigned for the benefit of creditors (*Buckley v. Furniss*, 17 Wend. (N. Y.) 504), or "failed in business" (*Clark v. Lynch*, 4 Daly (N. Y.) 83, 86), or failed, become openly insolvent and his paper gone to protest (*Holbrook v. Vose*, 6 Bosw. (N. Y.) 76), it has been held that the buyer was insolvent to such an extent that the right of stoppage arose. For the Sales Act definition of "insolvency," see sec. 156, post.

A debtor shipping goods to a creditor in payment of a debt is not an unpaid seller and has no right of stoppage *in transitu*. *Clark v. Mauran*, 3 Paige (N. Y.) 373.

§ 139.

When Goods Are in Transit.

§ 139. WHEN GOODS ARE IN TRANSIT. 1. Goods are in transit within the meaning of section one hundred and thirty-eight.

(a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

2. Goods are no longer in transit within the meaning of section one hundred and thirty-eight,

(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

3. If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer.

4. If part delivery of the goods has been made to the

buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.¹

Effect of Section. The section is believed to declare the common law.

English Act. Section 45 of the Sale of Goods Act furnished the model for this section, but there are numerous changes of wording and arrangement. A few cases have been decided under this section of the English act. In *Kemp v. Ismay*, 100 L. T. N. S. 996, 997, it was held that, where the buyer of goods was a commission agent purchasing for shipment from England to Australia, and he directed the seller at Manchester to send goods to forwarders at Liverpool, marked "N. X. Z. Adelaide," for shipment by the ship *Suevic*; and the seller forwarded the goods to Liverpool, where they were shipped by the *Suevic*, through the agency of the forwarders, the goods were in transit while enroute from Liverpool to Adelaide and might be stopped by the sellers on the bankruptcy of the buyers. In *Taylor v. Great Eastern R. Co.*, [1901] 1 K. B. 774, 84 L. T. N. S. 770, the sellers sold barley to one Sanders "on rail" at a certain station. When the barley arrived there the carrier notified the buyer that the goods were held by it as a warehouseman and not a carrier, awaiting the buyer's order. The buyer attempted to sell the barley, using a sample obtained from the seller, but he did not remove the barley from the possession of the carrier. He later became

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bankrupt and the original seller took the goods from the carrier under a claim of stoppage *in transitu*. The trustee in bankruptcy of Sanders now sues the carrier for damages for conversion of the goods. Held, that the transit had ceased after a reasonable time had elapsed after the receipt of the notice to the buyer from the carrier, and that the delivery to the original seller was a conversion. In *Jobson v. Eppenheim*, 21 Times L. Rep. 468, goods were ordered by the buyer to be shipped to Goole to be delivered to forwarding agents there, but no further destination was known to the seller, although he knew that the goods were to be reshipped. Held, that the transit ended at Goole, and after the goods had been reshipped by the forwarding agents by direction of the buyer to Hamburg, the seller could not stop them in transit. In *M'Dowall v. Snowball Co.*, Sc. Ct. Sess. 7 F. 35, it was held that where the seller takes a bill of lading to his own order, the *transitus* does not end until the goods reach their destination and the buyer takes delivery, and they may be stopped when at the port of destination but undelivered to the buyer.

¹ When Goods Are in Transit. The rules laid down by this section are believed to be substantially in accord with the rules of the New York common law, although not all of the points mentioned in the act have been brought to the attention of the courts in this state.

Illustrative Cases.

The following cases will show the principles in force at common law: In *Becker v. Hallgarten*, 86 N. Y. 167, it was held that, where the buyer directs the seller to ship goods to Bremen, there to await the orders of the buyer as to their further destination, upon the arrival of the goods at Bremen, and their delivery to an agent of the buyer there, the transit ends, notwithstanding that by a subsequent order of the buyer's assignee the goods are shipped to New York. The court said (pp. 173, 174): "It has been held that the delivery to the vendee, which puts an end to the state of passage, may be at a place

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where he means the goods to remain until a fresh destination is communicated to them by orders from himself."

In *Harris v. Pratt*, 17 N. Y. 249, the buyers had places of business in New York and Nottingham, England, and ordered goods of the seller in England, to be sent as per custom to an agent of the buyer at Liverpool, for delivery to the New York house, the house in Nottingham to give directions to the agent in Liverpool regarding the manner of shipment. The goods were actually shipped from Liverpool to New York, and while in transit, the buyers stopped payment and became insolvent. It was held that the seller might stop the goods by serving a notice on the assignees of the buyer, the custom house officers and the owners of the vessel, after the goods had arrived in New York and before their unloading, even though the assignees of the buyers had entered them in the custom house. The court said that the question as to whether delivery to an agent of the buyer was delivery to the buyer, so as to stop the transit, was determined by the purpose of the employment of the agent. If that purpose be "to expedite the property towards its destination, or to aid those engaged in forwarding it, the seller's right to stay the final delivery continues." (p. 253). Where the goods are delivered to an agent at an intermediate point, to await directions from the buyer regarding the manner of carriage to a final destination previously mentioned, the transit is not ended.

Delivery is not made to the buyer by the delivery to him of bills of lading for the goods. The seller may stop the goods after such delivery. *Ainis v. Ayres*, 62 Hun 376, 16 N. Y. S. 905.

Where goods are directed to be sent to Havana, N. Y., and the evidence shows a custom to deposit them there with a warehouseman to wait until the buyer calls for them, the goods are in transit when in the warehouseman's hands. "The law appears to be well settled that the right of stoppage *in transitu* exists so long as the goods remain in the hands of a middleman on the way to the place of their destination, and that the right terminates, whenever the goods are or have been, either actually or constructively delivered to the vendee; a delivery to the general agent of the vendee is of course tantamount to a delivery to himself." *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611, 613.

Where iron is directed to one Titus, the buyer, at Malone, "to the care of Thomas Green of Plattsburgh," and the goods are received at Plattsburgh and put in the warehouse of Green, whence 12 days later the iron is taken and delivered to one Burton, a common carrier by land who was employed by Titus to convey the iron to Titus-

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ville, a place 8 miles from Malone and the residence of Titus; and a day or two later the iron, while in the possession of Burton at Malone, is seized by a constable on an attachment against the buyer, and later while in the constructive possession of the constable it is stopped and claimed by the seller, the iron is still in transit so as to entitle the seller to take it, the buyer having become insolvent. *Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 17 Wend. (N. Y.) 504. "The warehouseman was not the agent of Titus for any other purpose than that of storing the goods, and the goods only rested at that place for the purpose of changing the mode of transportation. They were not to remain at Plattsburgh until the vendee should put them in motion in a new direction; their ultimate destination had already been fixed by the vendee, and that destination they had not reached. The *transitus* was therefore not at an end, and in such a case the vendor clearly had the right to resume possession of the goods." *id.* 146. "There are cases where the delivery of the goods to a third person for safe custody, for disposal on the part of the vendee, or to await his orders as to the place of destination, has been held equivalent to an actual delivery to the vendee, and that the vendor's right to stop the goods was consequently determined. But where the delivery to a carrier or other agent is for the mere purpose of conveyance to the purchaser, the right of the vendor to stop the goods continues until they come to the actual possession of the vendee, or reach the end of their journey." *id.* 145, 146.

Imported Goods.

Goods are still in transit when they have been received at the port of destination, the freight paid by the buyer, but the customs duties not paid, and the goods landed and placed in a public store to be held there by the government officials for sale if the duties are not paid. The mere entry of the goods at the custom house by the buyer has no effect. *Mottram v. Heyer*, 5 Den. (N. Y.) 629.

Goods in a public store awaiting the completion of their entry at the custom house by the payment of the duties, are to be deemed still *in transitu*. *Hauterman v. Bock*, 1 Daly (N. Y.) 366.

In *Fraschieris v. Henriques*, 6 Abb. Pr. N. S. (N. Y.) 251, the following rules are laid down regarding the termination of the transit where goods are imported; "1. Where the goods are removed under general orders, in default of an entry, the right of stoppage *in transitu* is not terminated. 2. Where a formal entry is made, but is not followed up by proper bonding, the right continues. 3. But where there is a perfect entry, and the goods are thereupon regularly bonded and warehoused, the right ceases." *id.* 261.

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Illustrative Cases

Where a buyer delivers to a creditor an order for the goods bought and the creditor gets them from the carrier before the buyer has any possession of them, and cancels the debt and pays some cash in return for the goods, the right of stoppage has ceased, either because the creditor was an agent of the buyer and the delivery to him was constructively delivery to the buyer, or because the sale to a *bona fide* purchaser for value deprives the seller of his right of stoppage. *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658.

Where iron is sold while on shipboard and the seller agrees that the iron may be shipped from New York to Milwaukee in boats, which are by a bond of the carriers to the government made government bonded warehouses, and the iron is entered by the buyer at the custom house for transportation to Milwaukee, and later delivered to the boats, the masters of which sign and deliver to the buyer receipts stating that they have received the goods marked with the name of the buyer, and the buyer becomes insolvent during the transit from New York to Milwaukee, the goods may lawfully be stopped by the seller at Oswego, as they are still in transit. *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76. "Delivery of goods to an agent of the vendee, or to a person employed by him, if it be done with the view and for the purpose of forwarding them to the vendee himself, is not enough to prevent the exercise of the vendor's right. The possession of such agent or employee, in such case, is not the possession which terminates that right." *id.* 104. "The goods had not come to the actual possession of any agent of the vendees for the purpose of disposal." *id.* 105.

Delivery to Agent.

Transit may cease by delivery to the buyer's agent, if he is authorized to receive the goods. *Mottram v. Heyer*, 5 Den. (N. Y.) 629, 630; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658.

If the buyer or his agent obtains possession of the goods before they arrive at their destination, the right of stoppage is lost. *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658, 663.

Shipment in Buyer's Vessel.

The right of stoppage may exist, even though the goods are shipped on the buyer's own vessel, or on a vessel chartered by him, if the parties manifest their intention that the destination shall be the buyer's place of business. *Cross v. O'Donnell*, 44 N. Y. 661, 666, 4 Am. Rep. 721; *Gossler v. Schepeler*, 5 Daly (N. Y.) 476. But in other cases delivery on board the buyer's vessel or a vessel chartered by him has been held to end the transit. *Sturtevant v. Orser*, 24 N. Y. 538, 82 Am. Dec. 321; *Pequeno v. Taylor*, 38 Barb. (N. Y.) 375.

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Part Delivery.

Where a portion of the goods has been actually received by the buyer, the seller may nevertheless exercise the right of stoppage as to the remainder of the goods. *Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 17 Wend. (N. Y.) 504. But see *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658, 663.

§ 140.

Ways of Exercising Right to Stop.

§ 140. **WAYS OF EXERCISING THE RIGHT TO STOP.** 1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller.

The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.¹

Effect of Section. The section is believed to be declaratory of the common law. The last sentence of sub-section 2 should be noted as a part of the general scheme of the Sales Act for enlarging the negotiability of documents of title. See sections 108 to 121, ante.

English Act. The section is the substantial equivalent of section 46 of the Sale of Goods Act, except for the last sentence of sub-section 2, which does not appear in the English act.

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¹ **Ways of Exercising the Right to Stop.** "Under the decisions made within the last half century, it is sufficient if the vendor or his agent at any time before the *transitus* is ended, gives notice to the carrier, or middleman, in whose possession or under whose control the goods are, of his rights, and prohibits the delivery of the goods to the vendee or his assigns." *Mottram v. Heyer*, 5 Den. (N. Y.) 629, 633. "But to make the notice effectual it must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has such custody, at such time and under such circumstances that he may with reasonable diligence prevent the delivery of such goods to the vendee." *id.* 634.

Where goods are on a vessel awaiting unloading, the right of stoppage is properly exercised by giving notice of the seller's claim to the owner of the vessel, the custom house officers and the assignee in bankruptcy of the buyers. *Harris v. Pratt*, 17 N. Y. 249. Where goods have been seized by a creditor of the buyer, notice of an exercise of the right of stoppage given to the creditor is a proper method of exercising that right. *Clark v. Lynch*, 4 Daly (N. Y.) 83.

The right of stoppage may be exercised by a written notice to the agent of the carrier who has received the goods for transportation, and by the commencement of a replevin action and the seizure of the goods by a sheriff. *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76.

It is not necessary that the seller should take actual possession of the goods before they come into the possession of the buyer in order to exercise his right of stoppage. *Mottram v. Heyer*, 5 Den. (N. Y.) 629. The seller in exercising his right of stoppage and in order to entitle him to demand the goods of the carrier must pay the carrier's lien and claims on the goods for freight. *idem.* If the carrier delivers to the buyer after proper notice of stoppage *in transitu*, he is liable to the seller in damages for the loss. *id.* 634.

For other illustrations of the methods of stopping goods *in transitu* held valid in this state, see the cases cited under section 138 and 139, *ante*.

CHAPTER XIII.

RESALE AND RESCISSION.

§ 141. WHEN AND HOW RESALE MAY BE MADE. 1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.¹

3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

4. It is not essential to the validity of a resale that no-

§ 141. When and How Resale May Be Made.

tice of the time and place of such resale should be given by the seller to the original buyer.

5. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.²

Effect of Section. This section is believed to change the law regarding the necessity of notice of intention to resell the goods, but otherwise to express the theory of the common law. The weight of authority in this state at common law seemed to require that the seller give the buyer notice of his intention to make a resale. The Sales Act does not, but makes the giving or failure to give notice evidence upon the question whether the resale was reasonable or not.

English Act. Section 48 of the Sale of Goods Act is the model from which this section is drawn, but the changes are numerous. See appendix for the text of the English act.

¹ **Right of Resale and Effect.** Sub-sections 1 and 2 describe the conditions under which a resale may be made and its effect. Probably they state the common law, although the courts have not clearly classified the conditions under which the resale may be made, as has the Sales Act.

Illustrative Cases.

"When a vendor rightfully stops goods *in transitu*, or retains them before *transitus* has begun, he can, by a sale made on notice to the vendee, vest a purchaser with a good title. (*Dustan v. McAndrew*, 44 N. Y. 72). His right is very nearly that of a pledgee, with power to sell at private sale in case of default." *Tuthill v. Skidmore*, 124 N. Y. 148, 154, 26 N. E. 348. In *Lewis v. Greider*, 51 N. Y. 231, the plaintiff had contracted to sell certain barley to the defendant, title had passed to the buyer and he had refused to accept the barley. The

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court said: "The plaintiffs' equitable lien upon the barley, as a security for their damages occasioned by the defendant's refusal to receive and pay for it, as well as their right to sell it and apply the avails, so far as they would go, to satisfy their lien and maintain their action for the balance, is not at this day involved in doubt. (*Bement v. Smith*, 15 Wend. (N. Y.) 493, 497.) In making the sale the vendor is the agent of the vendee to sell the property, and should sell it fairly and to the best advantage." (p. 236). But the resale need not be at the place where the goods are at the time of refusal and are to be delivered, but may be made at a distant market if a better price can be secured there. *Lewis v. Greider*, *supra*; *McGibbon v. Schlessinger*, 18 Hun (N. Y.) 225. The expenses of resale should be charged to the buyer, and the net reselling price is the basis of damages. *Lewis v. Greider*, *supra*.

Contract Executed or Executory.

The right of resale to fix the measure of damages exists both in executory and executed contracts of sale. In the case of executory contracts the remedy of resale exists under section 145, post. The rules relating to the conduct of the resale, however, have been considered the same in both cases, hence some cases are cited in this note in which the title had not passed to the buyer. It is believed that this is justified by the fact that the courts have made no distinction between the right of resale and the conditions under which it may be exercised in executory contracts and in executed contracts.

Illustrative Cases.

For other cases maintaining the doctrine set forth in sub-section 1, see *Hayden v. Demets*, 53 N. Y. 426; *Smith v. Pettee*, 70 N. Y. 13; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Babcock v. Bonnell*, 80 N. Y. 244 (in this case it is stated that there is no right of resale until the period of credit expires); *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Goodman v. Steinfeld*, 20 Misc. 224, 45 N. Y. S. 1141; *Ford v. Erde*, 50 Misc. 665, 99 N. Y. S. 487; *Whitney v. McLean*, 4 App. Div. 449, 38 N. Y. S. 793; *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Fancher v. Goodman*, 29 Barb. (N. Y.) 315; *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590.

The buyer from an unpaid seller who makes a resale gets a good title. *Tuthill v. Skidmore*, 124 N. Y. 148, 154, 26 N. E. 348. This is the rule of sub-section 2.

Conduct of Resale. *Notice of Intention to Resell.* The weight of authority in this state seems to be that notice of intention to resell was

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necessary at common law. "Where the second method is adopted and the vendor chooses to make a resale, that need not be at auction, unless such is the customary method of selling the sort of property in question, nor is it absolutely essential that notice of the time and place of sale should be given to the vendee. (*Pollen v. Le Roy*, 30 N. Y. 556). Still, as the sale must be fair, and such as is likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell and quite unsafe to omit it." *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415. For cases in which dicta or decisions appear that notice of intention to resell is necessary, see *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Babcock v. Bonnell*, 80 N. Y. 244, 249; *Sawyer v. Dean*, 114 N. Y. 469, 481, 21 N. E. 1012; *Tuthill v. Skidmore*, 124 N. Y. 148, 154, 26 N. E. 348; *McGibbon v. Schlessinger*, 18 Hun (N. Y.) 225; *Case v. Simonds*, 54 Hun 635, mem., 7 N. Y. S. 253; *Petrie v. Stark*, 79 Hun 550, 29 N. Y. S. 881; *Fancher v. Goodman*, 29 Barb. (N. Y.) 315; *Westfall v. Peacock*, 63 Barb. (N. Y.) 209; *Crooks v. Moore*, 1 Sandf. (N. Y.) 297; *Pratt v. S. Freeman, etc., Mfg. Co.*, 115 Wis. 648, 92 N. W. 368. But apparently contra are *Fox v. Woods*, 96 N. Y. S. 117; *Mann v. National Linseed Oil Co.*, 87 Hun 558, 34 N. Y. S. 481; *Goodman v. Steinfeld*, 20 Misc. 224, 45 N. Y. S. 1141.

The Sales Act, therefore, works a change in the law upon this subject. Sub-section 3 states that notice is not necessary.

Notice of Time and Place of Resale.

On the other hand, the common law authorities are unanimous that notice of the time and place of the resale is unnecessary, and thus the Sales Act (sub-section 4) continues the pre-existing law. The case of *Pollen v. Le Roy*, 30 N. Y. 549, was the case of a resale under an executory contract. The court said that the seller must take all proper measures to secure as fair and favorable a sale as possible. "The law regards him, as has been said in some of the cases, if in possession of the goods, as the agent *quoad hoc* of the vendee. But it is no part of such an agency or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold, or exposed for sale." (p. 556). For like expressions of judicial opinion, see *Messmore v. New York Shot, etc. Co.*, 40 N. Y. 422 (resale by buyer because of refusal of seller to take back defective goods); *Lewis v. Greider*, 51 N. Y. 231, 236; *McGibbon v. Schlessinger*, 18 Hun (N. Y.) 225; *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590; *Passaic Mfg. Co. v. Hoffman*, 3 Daly (N. Y.) 495, 528; *Pratt v. S. Freeman, etc., Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

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Fair Sale Sufficient.

The common law decisions seem to support the statements of subsection 5. "In such case, the vendor is treated as the agent of the vendee to make the sale, and all that is required of him, is that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence." *Dustan v. McAndrew*, 44 N. Y. 72, 79. "The law is satisfied with a fair sale, made in good faith, according to established business methods, with no attempt to take advantage of the vendee." *Ackerman v. Rubens*, 167 N. Y. 405, 408, 60 N. E. 750, 53 L.R.A. 867, 82 Am. St. Rep. 728. See also *Lewis v. Greider*, 51 N. Y. 231, 236; *Smith v. Pettie*, 70 N. Y. 13; *Fox v. Woods*, 96 N. Y. S. 117; *Crooks v. Moore*, 1 Sandf. (N. Y.) 297; *Austin v. Hartwig*, 49 Super. Ct. (N. Y.) 256.

§ 142. WHEN AND HOW THE SELLER MAY RESCIND THE SALE. 1. An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.¹

Effect of Section. This section seems declaratory of the established law.

English Act. The Sale of Goods Act has no corresponding section and the English law does not recognize the doctrine of this section.

¹**When and How the Seller May Rescind the Sale.** As in the case of the right of resale, the courts have not distinguished between the right to rescind where the seller is unpaid and the title has passed to the buyer, and the right to elect to retain title where the contract is executory and the title in the seller. But the New York authorities seem to warrant the statement that section 142 makes no change in the law of the state. Thus in *Dustan v. McAndrew*, 44 N. Y. 72, 78,

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Rescission by the Seller.

the court said: "The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1.) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3.) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price."

Illustrative Cases.

For other cases supporting the section, see *Benedict v. Field*, 16 N. Y. 595, 598, 599; *Hayden v. Demets*, 53 N. Y. 426; *Bridgford v. Crocker*, 60 N. Y. 627; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Babcock v. Bonnell*, 80 N. Y. 244; *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L.R.A. 867, 82 Am. St. Rep. 728; *Levy v. Glassberg*, 92 N. Y. S. 50; *Hornberger v. Feder*, 30 Misc. 121, 61 N. Y. S. 865; *Fancher v. Goodman*, 29 Barb. (N. Y.) 315.

Mere insolvency of the buyer does not rescind the contract of sale, but merely relieves the seller from his obligation to give credit. *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885.

Obviously rescission of a contract of sale may be by mutual consent of both parties. *Sturtevant v. Orser*, 24 N. Y. 538, 82 Am. Dec. 321.

For cases holding that some acts are necessary to manifest a rescission of a contract of sale and discussing the nature of the acts necessary, see *Wilber v. Leonard*, 56 Hun 364, 10 N. Y. S. 350; *Healy v. Utly*, 1 Cow. (N. Y.) 345.

§ 143.

Sale of Goods Subject to Stoppage.

§ 143. **EFFECT OF SALE OF GOODS SUBJECT TO LIEN OR STOPPAGE IN TRANSITU.** Subject to the provisions of this article, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.¹

Effect of Section. The section is believed to be declaratory of the common law, except that the theory of documents of title expressed in the last paragraph of the section does not accord with the common law theory. Under the act the seller's rights will not be defeated unless there has been a negotiation of a negotiable document of title. At common law mere transfer of the bill was sufficient. See note below.

English Act. Section 47 of the Sale of Goods Act corresponds in its first paragraph with the first sentence of section 143, but the provisions regarding documents of title are materially different. See text of Sale of Goods Act in appendix.

¹ **Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.** The principle announced in the first sentence of this section is recognized in *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, where the court says

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(pp. 106, 107): "It may be stated, as the general rule, that a mere sale of the property, unaccompanied by delivery, or by anything in legal contemplation operating as a change of possession, will not divest the right of the vendor to stop the goods. The purchaser from the vendee, in such case, takes only the vendee's right; subject to the contingency which may, before the goods are received, entitle the original vendor to resume the possession and hold it until the price be paid." See also *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 17 Wend. (N. Y.) 504; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Palmer v. Hand*, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392; *Clark v. Lynch*, 4 Daly (N. Y.) 83; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93.

Sale of Document of Title.

On the other hand, the negotiation of a negotiable bill of lading or other document, under the Sales Act, amounts to a transfer of possession to the taker of the document, and hence it defeats the seller's lien and right of stoppage. At common law strict negotiation of the document seems to have been unnecessary. The mere transfer of the document was considered to have the effect of delivery of possession, and, therefore, to defeat the lien or right of stoppage. Thus in *Becker v. Hallgarten*, 86 N. Y. 167, 174, the bill of lading was not indorsed but the seller's rights were held to be defeated. The court said: "That right [that of stoppage] may always be defeated by indorsing and delivering a bill of lading of the goods to a *bona fide* indorsee for a valuable consideration, without notice of the facts on which the right of stoppage would otherwise exist" (p. 174).

For similar holdings see *Dows v. Perrin*, 16 N. Y. 325, 332; *Gass v. Astoria Veneer Mills*, 134 App. Div. 184, 191, 118 N. Y. S. 982; *Rosenthal v. Dessau*, 11 Hun (N. Y.) 49, 50, 51; *Strahlheim v. Wallach*, 12 Daly (N. Y.) 313; *Ives v. Polak*, 14 How. Pr. (N. Y.) 411; *Hollingsworth v. Napier*, 3 Cai. (N. Y.) 182, 2 Am. Dec. 268; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76; *Dows v. Greene*, 32 Barb. 490, affirmed 24 N. Y. 638. In some of these cases the document actually was indorsed, but the common law theory was that it was immaterial whether the document was negotiable or was indorsed, if negotiable. The document represented the goods and delivery of it was equivalent to delivery of the goods.

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PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

CHAPTER XIV.

SELLER'S REMEDIES.

§ 144. ACTION FOR THE PRICE. 1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.¹

2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.²

3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section one hundred and forty-five are not applicable, the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive

them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.³

Effect of Section. Sub-sections 1 and 2 are declaratory of the pre-existing law, but sub-section 3 modifies the law. Formerly the seller could maintain an action in all cases after tender of the goods. Now he may maintain such an action only when the goods "cannot readily be resold for a reasonable price." See note 3 below.

English Act. Section 49 of the Sale of Goods Act is the model from which this section is drawn, but the last sentence of sub-section 2 and the whole of sub-section 3 are peculiar to the American act.

¹ Action for Price Where Property Has Passed to Buyer. The principle that under such circumstances the seller may recover from the buyer the price is so elemental that no extensive citation of authority is necessary. See *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190.

Illustrative Cases.

The following are miscellaneous cases illustrating various points connected with actions to recover the price of goods sold and delivered: *Herzog v. Heyman*, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646 (action may not be maintained where consideration has failed); *Keller v. Strasburger*, 90 N. Y. 379 (no action for price till term of credit expires); *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648 (no recovery of price where buyer has prevented seller from making valid tender of performance); *Locklin v. Moore*, 57 N. Y. 360 (effect of making price payable at given time and place); *Genesee Valley Milk Products Co. v. J. H. Jones Corp.*, 143 App. Div. 624, 128 N. Y. S. 191 (buyer liable for price of milk illegally sold under Agricultural Law); *Flood v. Senger*, 140 App. Div. 140, 124 N. Y. S. 1013 (seller may not recover purchase price where there has been a rescis-

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sion of contract under mutual mistake and goods abandoned to buyer); *Hilton Lumber Co. v. Sizer*, 137 App. Div. 661, 122 N. Y. S. 306 (no recovery of part of price for part performance); *Gourd v. Healy*, 137 App. Div. 323, 122 N. Y. S. 7 (no action for price until seller has properly performed); *Frazer v. Mott*, 118 App. Div. 791, 103 N. Y. S. 851 (delivery made to nominee of buyer; action for price maintainable); *Lackawanna Mills v. Weil*, 78 Hun 348, 29 N. Y. S. 114 (no action for price maintainable where seller has not performed agreement to alter goods); *Dreyfuss v. Foster*, 3 N. Y. S. 54 (in action for price seller cannot recover warehouse charges he has paid for the storage of the goods); *Auto Spring Repairer Co. v. Mutual Auto Accessories Co.*, 72 Misc. 402, 130 N. Y. S. 140 (no recovery of price because no acceptance of offer to buy); *St. Hubert Guild v. Quinn*, 64 Misc. 336, 118 N. Y. S. 582 (recovery of price of books alleged to be immoral); *Taylor v. Esselstyn*, 62 Misc. 633, 115 N. Y. S. 1105 (installment payments; whole price not recoverable until buyer has defaulted in payment of last installment); *Hanna v. Mills*, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216 (no action for price till period of credit has expired).

Pleading.

Upon the question of pleading a cause of action for goods sold and delivered, see *Schulze v. Farrell*, 142 App. Div. 13, 126 N. Y. S. 678; *Ludwig v. Pusey Co.*, 143 App. Div. 290, 128 N. Y. S. 72; *Guernsey v. Carver*, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60.

2 Action for Price Where Price Made Payable at Specific Time.

The Sales Act recognizes here a principle of the common law, namely, that where the buyer agrees to pay the price before the title is to pass, he may be compelled to do so. The passage of title is not a requisite to the maintenance of the action.

In *Gray v. Booth*, 64 App. Div. 231, 71 N. Y. S. 1015, it was held there where a buyer agrees to pay for goods by installments, the title to remain in the seller until all installments are paid, the seller may, when the buyer refuses to accept delivery of the goods, sue for and recover each installment as it matures, notwithstanding that title has not passed. The court says (p. 235): "A promise to pay a certain sum of money on a fixed day is one of the independent covenants on the part of the buyer, and yet it is claimed that he cannot be made to pay because he has agreed that he will pay before the property vests in him. If the contract is lawful and valid, I see no good reason why he may not be sued and be made to pay so far as a judgment for the sum promised will aid to that end. * * * The fact that the title to the property by the terms of the contract is not to vest in the buyer

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until a later day and until all the payments have been made in no way weakens the promise. The promise to pay is supported by ample consideration other than the actual vesting of the title."

For decisions to the same effect, see *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L.R.A. 537; *Morris v. Sliter*, 1 Den. (N. Y.) 59, 60; *Brewer v. Ford*, 54 Hun 116, 7 N. Y. S. 244; *Marvin Safe Co. v. Emanuel*, 21 Abb. N. Cas. (N. Y.) 181, 14 N. Y. St. Rep. 681; *Tufts v. Griffin*, 107 N. C. 47, 12 S. E. 68. The same rule has been applied to contracts relating to land. *Paine v. Brown*, 37 N. Y. 228; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362.

Seller Unable or Unwilling to Perform.

The rule laid down in the last sentence of sub-section 2 is illustrated by the following cases: *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L.R.A. 685 (buyer disabled seller from performance by removing incomplete article from his possession; cannot maintain action for damages for failure to deliver); *Earle v. Robinson*, 91 Hun 363, 36 N. Y. S. 178, affirmed 157 N. Y. 683, 51 N. E. 1090 (seller reclaiming and reselling goods cannot sue buyer for installments of price or whole price); *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362 (transfer of subject of sale to another); *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885 (seller excused from delivery on credit on buyer's insolvency); *James v. Burchell*, 82 N. Y. 108 (seller put it out of his power to perform); *Morris v. Rexford*, 18 N. Y. 552 (seller retook goods from buyer); *Edward Thompson Co. v. Boudin*, 135 App. Div. 872, 120 N. Y. S. 178 (no right to recover price after abandonment); *Edmead v. Anderson*, 118 App. Div. 16, 103 N. Y. S. 369 (seller retook goods from buyer); *White v. Gray*, 96 App. Div. 154, 89 N. Y. S. 481 (seller retook goods from buyer). The buyer ought not to be obliged to make a payment in advance of the transfer of title if it is evident that the seller will not, when time for transfer of title comes, be able or willing to transfer such title.

³ Action for Price When Title Has Not Passed. *Peculiar New York Rule.* By a long line of decisions in this state it has been held that, when the seller of personal property makes due tender of performance, but the buyer refuses to take the goods, the seller may retain the goods as belonging to the buyer and recover the contract price from him. This has been true at common law, regardless of the nature of the goods, whether they were readily resalable or not. *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Quick v. Wheeler*, 78 N. Y. 300; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Atkinson v. Truesdell*, 127 N. Y. 230,

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27 N. E. 844; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L.R.A. 867, 82 Am. St. Rep. 728; Cragin v. O'Connell, 50 App. Div. 339, 63 N. Y. S. 1071, affirmed 169 N. Y. 573, 61 N. E. 1128; Schwarzer v. Karsh Brewing Co., 74 App. Div. 383, 77 N. Y. S. 719; Heilbrunn v. Weislow, 129 App. Div. 532, 114 N. Y. S. 50; Gross v. Ajello, 132 App. Div. 25, 116 N. Y. S. 380; Silver v. Connolly, 46 Hun 679 mem., 12 N. Y. St. Rep. 616; Finlayson v. Wiman, 84 Hun 357, 32 N. Y. S. 347; Mackie v. Egan, 6 Misc. 95, 26 N. Y. S. 13; Hass v. Pettingill, 29 Misc. 318, 60 N. Y. S. 495; Stengel v. Hewit, 37 Misc. 670, 76 N. Y. S. 378; Westfall v. Peacock, 63 Barb. (N. Y.) 209; Levy v. Glassberg, 92 N. Y. S. 50.

But the seller must have tendered the exact amount called for by the contract in order to be able to force the title on the buyer. *Brown v. Norton*, 50 Hun (N. Y.) 248, 2 N. Y. S. 869.

Pleading.

As to pleading and form of action in such a case, see *Butler v. Hirzel*, 87 App. Div. 462, 84 N. Y. S. 693, affirmed 181 N. Y. 520, 73 N. E. 1120; *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. S. 380.

Rule of the Sales Act Different.

The New York rule upon this subject has been greatly modified by the Sales Act. Now only in cases where the goods "cannot readily be resold for a reasonable price" may the seller force the title on the buyer and recover the price of him. Formerly he could recover the price in all cases after due tender.

Sales Act Rule in Force Elsewhere.

The rule adopted by the Sales Act has been enforced in several American jurisdictions. See *Kinthead v. Lynch*, 132 Fed. 692 (mining machinery made to order); *River Spinning Co. v. Atlantic Mills*, 155 Fed. 466; *Ballentine v. Robinson*, 46 Pa. St. 177 (steam-engine); *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210 (lumber manufactured for particular purpose); *McCormick Harvesting Mach. Co. v. Markert*, 107 Ia. 340, 78 N. W. 33; *Gordon v. Norris*, 49 N. H. 376 (rule said to apply only when articles are manufactured to order after a particular pattern or for a particular purpose); *Smith v. Wheeler*, 7 Ore. 49, 33 Am. Rep. 698 (machinery). These cases may be of some assistance as quasi-precedents to be followed by the New York courts in construing the new rule.

Illustrated Postal Card Co. v. Holt, 81 Atl. (Conn.) 1061, is a recent case construing this sub-section and is referred to in the New York Law Journal for Feb. 9, 1912. There the action was to recover the price of postal cards manufactured by the plaintiff for the defend-

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ant for holiday use. The buyer, after giving the order, attempted to cancel a considerable part of it. The seller shipped the goods to the buyer and notified him that the goods were in the carrier's hands subject to the buyer's order. The goods could not be resold for a reasonable price to jobbers and wholesalers. It was held that the plaintiff's acts were a compliance with the sub-section of the Connecticut act corresponding to sub-section ² of section 144, and that the seller could recover the price. Referring to sub-section 3, the court said: "The elements of an action under this section are: (1) A breach of the contract to sell goods; (2) that the property in the goods at the time of the breach has not passed; (3) that they cannot be sold for a reasonable price; (4) that the seller has offered to deliver them to the buyer; (5) that he has refused to receive them; (6) that the seller has notified the buyer that he thereafter holds the goods as bailee for the buyer."

§ 145.

Damages for Nonacceptance.

§ 145. ACTION FOR DAMAGES FOR NONACCEPTANCE OF THE GOODS. 1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.¹

2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.²

4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.³

Effect of Section. The section is declaratory of the common law.

English Act. The American section is the practical equivalent of section 50 of the Sale of Goods Act, except that sub-section 4 is peculiar to the American act. The following are cases decided under the Sale of Goods Act: In *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, 92 L. T. N. S. 637, it was held that where a buyer repudiates a contract and refuses to accept goods because he claims the seller has breached an agreement not to sell to any one else, the seller may resell and recover the difference between the contract and resale price, when it appears that the seller made no agreement not to sell to others. It is immaterial that the seller did not tender goods corresponding to the contract in all respects, when the buyer repudiated it on another ground. The only effect of such a breach by the seller is to reduce the damages recoverable by the seller for failure to accept. In *Ryan v. Ridley*, 8 Com. Cas. 105, it was held that where, by a contract for the sale of perishable articles, it is provided that payment is to be made "by cash * * * in exchange for" shipping documents, the buyer is under an obligation to pay within a reasonable time after the shipping documents are tendered to him, and if he does not do so, the seller is entitled to sell the goods against him, and to claim the loss which he has suffered.

¹ **Right of Action upon Refusal to Accept.** It is elementary that if a buyer wrongfully refuses to accept and pay for goods which he has agreed to buy, he is liable to the seller in damages. *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Riendeau v. Bullock*, 147 N. Y. 269, 41 N. E. 561. This fundamental principle is illustrated by practically all the cases cited under this section.

Anticipatory Breach.

Where, before the time of delivery fixed by the contract, the buyer notifies the seller that he will not receive or pay for the goods, the

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vendor is justified in treating the contract as broken at that time and is entitled to bring an action immediately for the breach without tendering delivery. *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436. This is the so-called doctrine of "anticipatory breach" and is illustrated in the following cases: *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561; *Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496.

² **Measure of Damages for Nonacceptance.** *Ordinary Rule.* These portions of the section (sub-sections 1 and 2) obviously state the well established law. "The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery." *Windmuller v. Pope*, 107 N. Y. 674, 675, 676, 14 N. E. 436. To the same effect see *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Finlayson v. Wiman*, 84 Hun 357, 32 N. Y. S. 347; *Schwartzbach v. Hass*, 36 Misc. 806, 74 N. Y. S. 884; *Lekas v. Schwartz*, 56 Misc. 594, 107 N. Y. S. 145.

Where it is impracticable to show the market price at the precise time and place of delivery, evidence may be received of "the price at places not distant, or in other controlling markets," * * * "not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery." *Cahen v. Platt*, 69 N. Y. 348, 352, 25 Am. Rep. 203.

Where the subject matter of the contract is ice and the buyer rejects it, the seller may recover the contract price as damages for non-acceptance, when he has used due diligence to dispose of the ice, but it has melted. *Riendeau v. Bullock*, 147 N. Y. 269, 41 N. E. 561. The seller is entitled to at least nominal damages, if the buyer has refused to receive the goods. *Petigor v. Ward*, 36 Misc. 816, 74 N. Y. S. 867. *No Market Price.*

It frequently happens that the goods have no market price. Where there is no market price for the article contracted to be sold, and the buyer repudiates or breaks the contract, the seller may recover as damages the difference between what it would have cost him to manufacture or furnish the article and the contract price. *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L.R.A. 225; *Kelso v. Marshall*, 24 App. Div. 128, 48 N. Y. S. 728; *Deery v. Williams*, 27 App. Div. 131, 50 N. Y. S. 138; *Dryfoos v. Uhl*, 69 App. Div. 118, 74 N. Y. S. 532; *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N. Y. S. 385; *Lehmaier v. Standard Specialty, etc., Co.*, 123 App. Div. 431, 108 N. Y. S. 402;

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Isaacs v. Terry Co., 132 App. Div. 657, 117 N. Y. S. 369; Meyer Bros. Drug Co. v. McKinney, 137 App. Div. 541, 121 N. Y. S. 845.

Resale to Estimate Damages.

It is rudimentary that the seller may estimate the damages he has suffered by making a resale of the goods. "The difference between the agreed price of an article, and its market value at the time of delivery, is the actual damage sustained by a vendor upon the refusal by a vendee to accept the property sold, and the vendor may ascertain or liquidate this amount by a resale, taking all proper measures to secure as fair and favorable a sale as possible." Pollen v. Le Roy, 30 N. Y. 549, 556. "The result of the sale, as well as its purpose, was to ascertain and establish the amount of damages the plaintiff's assignor in fact sustained." Moore v. Potter, 155 N. Y. 481, 490, 50 N. E. 271. For cases upon the right of resale, see *Dustan v. McAndrew*, 44 N. Y. 72, 78; *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L.R.A. 867, 82 Am. St. Rep. 728; *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369, 70 N. E. 928; *Jardine v. Huguet Silk Co.*, 203 N. Y. 273, 96 N. E. 449. "The expenses of making such sale, as well as the expenses of preserving and taking care of the property after default and before the sale, together with the difference between the contract and selling price, is the proper measure of damages in such action." *House v. Babcock*, 63 Hun 626, mem., 17 N. Y. S. 640.

The general right of resale and the method of conducting the resale have been discussed under section 141, ante. The resale must be made within a reasonable time. *Bigelow v. Legg*, 102 N. Y. 652, 6 N. E. 107; *Almy v. Simonson*, 52 Hun 535, 5 N. Y. S. 696. If the resale is made unfairly the price received upon it will not fix the damages recoverable. *Case v. Simonds*, 54 Hun 635 mem., 7 N. Y. S. 253.

Cost of Completing Contract.

Where the breach is anticipatory and the cost of completing the contract is to be determined, the cost of labor and materials during the natural time of performance should be considered, not the cost of such items at the time of the breach. *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967. But see *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

³ **Duty of Seller Where Goods are Incomplete.** The doctrine of sub-section 4 is illustrated by *Woolf v. Hamburger*, 129 App. Div. 883, 114 N. Y. S. 186. That was an action to recover the price of clothing to be manufactured by the plaintiff for the defendant. Before the completion of the clothing the defendants notified the plaintiff that they

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cancelled the order. Held, that the plaintiff was not entitled to go on with the contract and recover the full price, but could only recover the damages sustained at the time of the cancellation. "It is quite clear, I think, upon this state of facts, that while the plaintiff may have been entitled to recover the damages that he had sustained in consequence of the repudiation of the contract by the defendants, he was not entitled to recover the full contract price. After the contract had been cancelled, the plaintiff could not go on and complete the manufacture and recover from the defendants the full contract price. He was bound, then, to reduce the damage, and while he may have been entitled to recover the damages that he had sustained up to the time of the cancellation of the contract by the defendants, he was not entitled to furnish the manufactured articles and recover the contract price." (p. 885).

For other cases sustaining this sub-section, see *Clark v. Marsiglia*, 1 Den. (N. Y.) 317, 43 Am. Dec. 670; *Dillon v. Anderson*, 43 N. Y. 231; *Lord v. Thomas*, 64 N. Y. 107; *Johnson v. Meeker*, 96 N. Y. 93, 48 Am. Rep. 609.

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Rescission by Seller.

§ 146. WHEN SELLER MAY RESCIND CONTRACT OR SALE. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.¹

Effect of Section. The section makes no apparent change in the law of New York.

English Act. The Sale of Goods Act has no corresponding section and the English law does not recognize the doctrine of the section.

¹ **When Seller May Rescind Contract or Sale.** Upon this subject see section 142, ante, and the notes thereto. The New York cases seem to support the section, although the matter has apparently never been stated in the form of the section. Thus in *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 105 App. Div. 341, 344, 85 N. Y. S. 1034, 93 N. Y. S. 1146 (reversed on another ground, 186 N. Y. 89, 78 N. E. 701), the court says: "But there can be no question that a wilful and intentional departure from a contract, where the defects of performance pervade the whole and are so essential as substantially to defeat the object which the parties intended to accomplish, that such defects are ample grounds for rescission." See also *King v. Faist*, 161 Mass. 449, 37 N. E. 456; *Morris v. Rexford*, 18 N. Y. 552; *Hill v. Blake*, 97 N. Y. 216; *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248; *Sloane v. Van Wyck*, 4 Abb. App. Dec. (N. Y.) 250; *Westfall v. Peacock*, 63 Barb. (N. Y.) 209; *Raymond v. Bearnard*, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317.

For analogous cases of the buyer's right to rescind see *Washburn v. Rainier Co.*, 130 App. Div. 42, 114 N. Y. S. 424; *Welsh v. Gossler*, 89 N. Y. 540.

A seller may rescind a right to credit without rescinding the contract of sale. *Foerster v. Gallinger*, 62 Hun 439, 17 N. Y. S. 144. Mere

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neglect on the part of the buyer to perform by the day specified in the contract is not enough to allow the seller to rescind. *Monroe v. Reynolds*, 47 Barb. (N. Y.) 574. Where a contract of exchange is rescinded by mutual consent, neither party has a right to demand storage charges for the goods which he has had in his possession, as a condition of the redelivery of the goods. *Shepard v. Rice*, 15 Daly 532, 8 N. Y. S. 472.

Notice.

Notice of election to rescind is obviously necessary. *Scovil v. Wait*, 54 N. Y. 650; *Borgfeldt v. Wood*, 92 Hun 260, 36 N. Y. S. 612, affirmed 154 N. Y. 784, 49 N. E. 1097; *White v. Dodds*, 42 Barb. (N. Y.) 554; *Monroe v. Reynolds*, 47 Barb. (N. Y.) 574.

If the seller rescinds the contract lawfully he may recover in quasi-contract the value of the goods already delivered. *Stocksdale v. Schuyler*, 55 Hun 610, mem., 29 N. Y. St. Rep. 380, affirmed 130 N. Y. 674, 29 N. E. 1034. For an analogous case, see *Person v. Stoll*, 72 App. Div. 141, 76 N. Y. S. 324, affirmed 174 N. Y. 548, 67 N. E. 1089.

CHAPTER XV.

BUYER'S REMEDIES.

§ 147. **ACTION FOR CONVERTING OR DETAINING GOODS.** Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.¹

Effect of Section. This section is a statement of elementary law.

English Act. The Sale of Goods Act has no corresponding section, but doubtless the law of England is in accord with the American section.

¹ **Action for Converting or Detaining Goods.** "This section is not contained in the English Sale of Goods Act, though it expresses undoubtedly the law of England as well as of this country. The language of the section is broad enough to include actions of tort for the conversion or detention of the property, actions of replevin, and also actions for breach of the seller's contractual obligation to deliver the goods." Williston on Sales, pp. 985-986.

Trover.

That the buyer may maintain trover for conversion if the seller refuses to deliver, see *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Philbrook v. Eaton*, 134 Mass. 398. See also *Benjamin on Sales* (7th ed.) sec. 886; *Mechem on Sales*, sec. 1786.

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Replevin.

It is obvious that a man may replevy his own property. For instances of replevin brought by buyer against seller, see *Barker v. Bushnell*, 75 Ill. 220; *Kent Iron, etc., Co. v. Norbeck*, 150 Pa. St. 559, 24 Atl. 737.

Damages for Conversion.

The ordinary measure of damages in case of conversion is the value of the goods at the time of the conversion, but when the goods fluctuate in value, as do stocks, the measure of damages is the highest market price during a time after the conversion reasonably sufficient to allow the owner to replace the goods. *Scott v. Rogers*, 31 N. Y. 676; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L.R.A. 289, 6 Am. St. Rep. 356. For the earlier view upon this subject, see *Cortelyou v. Lansing*, 2 Cai. Cas. (N. Y.) 200; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91.

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Action for Failing to Deliver Goods.

§ 148. **ACTION FOR FAILING TO DELIVER GOODS.** 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.¹

2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.²

Effect of Section. The section is declaratory of the common law.

English Section. Section 51 of the Sale of Goods Act is the corresponding section. The American section is made to apply solely to cases where the contract of sale is executory. The English section apparently applies to both executed and executory sales.

¹ **Right of Action.** All the cases cited in this note are evidence that the rule of sub-section 1 was recognized at common law as elementary.

Prerequisites to Recovery.

The buyer suing to recover damages for failure to deliver cannot recover without proving an offer to perform on his part, or that

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he was able and willing to perform. *Phelan v. Jones*, 114 N. Y. S. 9. Formal demand for the goods and tender of payment is unnecessary. Readiness and willingness to receive the goods and pay for them is sufficient. *Vail v. Rice*, 5 N. Y. 155; *Mount v. Lyon*, 49 N. Y. 552. If the seller disables himself from performing, it is obvious that the buyer need not tender performance. *Woolner v. Hill*, 93 N. Y. 576.

Where the buyer is required by the contract to give notice of readiness to receive delivery, he cannot maintain an action to recover a part payment without a demand for delivery. *Brown v. Babcock Electric Carriage Co.*, 71 Misc. 549, 125 N. Y. S. 544.

Buyer's Duty.

It is not essential that a buyer should buy goods in the market, after a failure of the seller to deliver, in order to obtain the damages actually suffered. *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14. The acceptance of part of the goods does not prevent an action for breach of contract in failing to deliver the balance. *Gilbert v. Alton*, 88 App. Div. 62, 84 N. Y. S. 682.

Installment Contract.

Where the vendor of goods, to be delivered and paid for in installments, refuses to deliver an installment, a breach of the entire contract is thereby established, for which the vendee, if he elects, may immediately recover all his damages; or he may wait until the expiration of the time for the delivery of all the goods and then recover. He cannot, however, split up his demand and maintain successive actions to recover for each default as it occurs; and when he obtains a judgment for damages for the nondelivery of part of the goods, it is a bar to the maintenance of a subsequent action to recover for the failure to deliver the balance. *Pakas v. Hollingshead*, 184 N. Y. 211, 6 Ann. Cas. 60, 77 N. E. 40, 3 L.R.A.(N.S.) 1042, 112 Am. St. Rep. 601.

Part Payments.

If the seller wholly fails to deliver the goods, due to their destruction before the property has passed, the buyer may recover back any portion of the purchase price paid. *Joyce v. Adams*, 8 N. Y. 291. And so, if the failure to deliver be wrongful, the buyer may recover part payments made. *Plumb v. Bridge*, 142 App. Div. 154, 126 N. Y. S. 853.

Where goods are confiscated because of the seller's failure to pay customs duties upon them, the buyer may rescind the sale and recover the purchase price which he has advanced. *Hamrah v. Maloof*, 127 App. Div. 331, 111 N. Y. S. 509.

Excuse.

The seller is excused from a breach of contract arising from fail-

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ure to deliver when such failure is due to the acts of the buyer, or when a third person whose note was to be given for the purchase price becomes insolvent. *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L.R.A. 685; *Roget v. Merritt*, 2 Cai. (N. Y.) 117.

² **Damages.** "The general rule [depending upon the market price] not being applicable, the plaintiff was entitled to recover such damages as were within the contemplation of the parties, i. e., those flowing directly and naturally from the breach." *Raymore Realty Co. v. Pfotenhauer-Nesbit Co.*, 145 App. Div. 163, 164, 129 N. Y. S. 1002. Sub-sections 1 and 2 undoubtedly express the common law.

Where goods contracted to be sold have no actual or market value at the time and place of delivery, the buyer can recover only nominal damages for failure to deliver. *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760.

Market Value the Ordinary Measure.

The ordinary rule is that the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery. *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14; *Falkenberg v. O'Neill*, 88 N. Y. S. 378. In an action to recover damages for breach of a contract to deliver bonds, the damages are to be estimated with reference to the price of the bonds at the best available market for the bonds. *Zimmerman v. Timmerman*, 193 N. Y. 486, 86 N. E. 540.

Method of Estimating Market Value.

The actual market is the criterion for estimating damages; not the market as it would have been if the quantity agreed to be delivered had been added to the market. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. Where there are no sales of the article contracted to be sold on the day of delivery, reference may be had to sales made within a reasonable time before and after the day of delivery, to ascertain its value on the day of delivery. *Dana v. Fiedler*, *supra*.

Where the price at the time and place of delivery cannot be shown, prices for a brief period before and after and at other places not distant, are competent to show the market price at the time and place of delivery. *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203. Where goods are deliverable during a season, the average market price during the season is the criterion, not the highest. *O'Gara v. Ellsworth*, 85 App. Div. 216, 83 N. Y. S. 120.

In the absence of a market price for wrenches agreed to be delivered to the plaintiff by the defendant, the measure of damages for breach of contract to deliver is the difference between the contract price and

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the fair value of the articles to the plaintiff if they had been delivered. *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 App. Div. 187, 87 N. Y. S. 41, affirmed 181 N. Y. 573, 74 N. E. 1118.

Prospective Profits.

Prospective profits are not allowable as damages when they were not within the contemplation of both parties. *Stecker v. Weaver Coal, etc., Co.*, 116 App. Div. 772, 102 N. Y. S. 89, affirmed 192 N. Y. 556, 85 N. E. 1116. But where a seller has notice that the buyer has made a sub-contract for the sale of the goods, the buyer may recover as damages the profits he would have made upon the resale. *Messmore v. New York Shot Co.*, 40 N. Y. 422; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Sutton v. Wanamaker*, 95 N. Y. S. 525.

Indirect Damages.

Where a failure to deliver machinery causes other machinery to lie idle, the buyer may recover as damages the rental value of the idle machinery during the period of idleness. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Cassidy v. LeFevre*, 45 N. Y. 562; *Nicholls v. American Steel, etc., Co.*, 117 App. Div. 21, 102 N. Y. S. 227, affirmed 191 N. Y. 554, 85 N. E. 1113.

For a failure to deliver brick to be used in the construction of a building the seller is liable for wages paid to workmen while idle and waiting for brick; but not for a proportionate amount of taxes on the property while work was delayed, nor for interest on the value of the property during that time. *Raymore Realty Co. v. Pfothenhauer-Nesbit Co.*, 145 App. Div. 163, 129 N. Y. S. 1002. Demurrage charges necessarily paid to a vessel kept in waiting by reason of the failure to deliver are recoverable by the buyer, when the fact of the intended delivery on board the vessel is known to the seller. *Miner v. Blume*, 64 App. Div. 511, 72 N. Y. S. 320.

Where the seller fails to deliver goods on time, it is the duty of the buyer to reduce the damages as much as possible by procuring other goods as soon as possible. *Parsons v. Sutton*, 66 N. Y. 92.

§ 149. **SPECIFIC PERFORMANCE.** Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.¹

Effect of Section. The section is believed to be declaratory of a well understood rule.

English Act. Section 52 of the Sale of Goods Act is the model from which this section was taken, and it is substantially equivalent.

¹**Specific Performance.** The draftsman of the act says of this section: "This section of the act will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed." (Williston on Sales, p. 997).

It is difficult, however, to see how the statutory rule is any broader than the common law rule. Both make it a matter of discretion with the courts of equity. Thus in *Butler v. Wright*, 186 N. Y. 259, 261, 262, 78 N. E. 1002, the court granted an injunction compelling the transfer of stock which had no market value and was practically controlled in its entire issue by the seller, and said: "The rule is that, as to contracts pertaining to personal property, a party should be confined to his action for damages, unless it appears that he is entitled to the thing contracted for in specie, which to him has some special value and which he cannot readily obtain in the market, or in cases where it is apparent that compensation in damages would not furnish a complete and adequate remedy. But in each case the question as to

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Specific Performance.

whether a court of equity will take jurisdiction and grant the relief asked for rests in the sound discretion of the court and it cannot be demanded as a matter of right."

For similar views and holdings, see *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Johnson v. Brooks*, 93 N. Y. 337; *In re Argus Co.*, 138 N. Y. 557, 572, 34 N. E. 388; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; *Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; *Lighthouse v. Buffalo Third Nat. Bank*, 162 N. Y. 336, 56 N. E. 738; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701.

§ 150.

Remedies for Breach of Warranty.

§ 150. REMEDIES FOR BREACH OF WARRANTY. 1. Where there is a breach of warranty by the seller, the buyer may, at his election,

(a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; ¹

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; ²

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; ³

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. ⁴

2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted. ⁵

3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale. ⁶

4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.⁷

5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section one hundred and thirty-four.

6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.⁸

Effect of Section. This section, in connection with section 130, ante, preserves to the buyer the right of action for damages after acceptance in all cases. It also gives the buyer a remedy unknown to the common law in New York, namely, the right to rescind the contract and return the

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Remedies for Breach of Warranty.

goods. The buyer's options under the common law were ordinarily rejection of the goods upon tender or recovery of damages in those cases where the right of action survived acceptance. This section, therefore, has an important modifying effect upon the New York law of Sales. Except in the particulars mentioned, it seems to declare the common law.

English Act. Section 53 of the Sale of Goods Act varies greatly from the corresponding section of the American act upon the matters of rejection, rescission and necessity to elect remedies. See the text of the English act in the appendix, post. Apparently the English act does not allow rejection of the goods upon tender when the property has passed to the buyer. It does not recognize the right to rescind the contract for breach of warranty, nor does it bar the buyer from recovering damages by action after he has recouped for the diminished value of the goods as a defendant.

The following digests of cases decided under the Sale of Goods Act may be useful: Where there is a breach of a warranty of quality, the buyer may recover as damages from the seller, damages which he has been obliged to pay to a sub-vendee. *Wallis v. Pratt*, [1911] A. C. 394, [1911] W. N. 117. The buyer of canned salmon may recover as damages for breach of a warranty of its fitness for food, medical and funeral expenses attendant upon his wife's sickness and death resulting from eating the salmon, and also the pecuniary damages caused by the loss of his wife's services and the consequent necessity of employing a servant to care for infant children. *Jackson v. Watson*, 100 L. T. N. S. 799. Where there is a breach of an implied warranty that milk sold to a householder is

fit for food, and the buyer's wife dies of typhoid fever as a result of drinking the milk, the buyer may recover as damages the expenses to which he has been put by reason of her illness and death. *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608, 92 L. T. N. S. 527. Where a manufacturer of brewing sugar has bought sulphuric acid by description as commercially free from arsenic, and it contains arsenic which renders poisonous the sugar made from it, and the sugar is used by brewers for making beer which becomes poisonous; and the brewers obtain damages from the buyer of the acid; the buyer may recover from the seller of the acid, as damages for the breach of engagement of description, the purchase price of the acid and the value of the materials destroyed by mixture with the acid to make sugar; but not the loss of good will occasioned by selling the poisonous sugar, nor the damages recovered by the brewers from the buyer of the acid. The latter are items of special damage and there was no statement of the purpose for which the acid was to be used by the buyer. *Bosstock v. Nicholson*, [1904] 1 K. B. 725, 91 L. T. N. S. 626. The defendant sold to the plaintiff an orchid with express warranty that it was a certain variety of white orchid. After two years it flowered and produced a purple flower. Had it been as warranted, at the time of the sale it would have been worth twenty pounds and at the time of the flowering fifty pounds. Held, that the plaintiff was entitled to recover the difference between the actual value of the orchid and fifty pounds, because the plaintiff could not prove a breach of the warranty until the time of flowering. Where the breach cannot be discovered at the time of the sale, the measure of damages is the difference between the value of the goods as warranted at the time of the discovery

the breach, and the value of them as actually furnished. *Ashworth v. Wells*, 78 L. T. N. S. 136. In an action for damages for breach of warranty on the sale of brewing sugar, arising from the fact that the sugar contained arsenic, the brewer may recover as damages the value of the beer spoiled by the use of the defective sugar, not merely the cost of replacing such beer, and also the expense of advertising a change in the use of brewing materials so as to notify customers that the arsenical sugar was no longer to be used. *Holden v. Bostock*, 50 W. R. 323. Where there is a breach of a warranty that crabs are fit for consumption as food, the buyer may recover damages incidental to sickness caused by eating the crabs. *Wallis v. Russell*, [1902] 2 Ir. R. 585. Where a wholesaler sells provisions with either an implied or express warranty of fitness for food, the buyer may recover as damages for breach of such warranty the value of goods seized and destroyed for unwholesomeness, a fine imposed and his expenses in the suit to recover the fine. *Crage v. Fry*, 67 J. P. 240.

¹**Recoupment. Counterclaim Distinguished.** The Sales Act distinguishes recoupment and counterclaim. "The theory of recoupment is that the plaintiff's damages are cut down to an amount which will compensate him for the value of what he has given. * * * Under the doctrine of recoupment the theory is that the defendant is not bound to perform the contract on his part, but he has received something of value for which he ought to pay. Under the doctrine of counterclaim the defendant does not seek to avoid his obligation under the contract but claims the right to enforce the plaintiff's obligations and to deduct the plaintiff's liability for breach of that obligation from the amount due from himself." *Williston on Sales*, p. 1003.

The New York courts have not seemed to make this distinction sharply, but use the terms recoupment and counterclaim interchangeably. Thus in *Gillespie v. Torrance*, 25 N. Y. 306, 308, 82 Am. Dec. 355, the court calls the right to set off a cause of action against that

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of the plaintiff "recoupment." "A careful examination of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross action to recover them." *id.* 309. And in *Deeves v. Manhattan L. Ins. Co.*, 195 N. Y. 324, 88 N. E. 395, the court held that where a defendant has an election to set up a cross claim of any kind to diminish or overcome the claim of the plaintiff, or to bring an independent action thereon, such claim, if asserted, must be set up as a counterclaim in the action, whether it constitutes what was formerly denominated recoupment, or any other claim coming within the code definition of a counterclaim. If a counterclaim is relied upon, it must be alleged in the answer and not left to inference.

Apparently recoupment and counterclaim have not been clearly distinguished in New York and the method of pleading has been the same in each case.

In *Brigg v. Hilton*, 99 N. Y. 517, 527, 3 N. E. 51, 52 Am. Rep. 63, the Court of Appeals names the three remedies allowed to the buyer for breach of warranty in sub-sections 1 (a) and 1 (b). "Nor can it be material whether the liability for breach of warranty is enforced by a direct action for damages, or by way of counterclaim, or when sued for the price as in *Muller v. Eno* (*supra*), by way of recoupment."

The practical results of relying on recoupment are ordinarily the same as those of relying on counterclaim, except that consequential damages cannot be proved in the case of recoupment, since recoupment is the mere restriction of the seller to a quasi-contract recovery for what he has furnished.

It is axiomatic that, if a warranty has been breached, the buyer has a cause of action for damages. Sub-section 1(b) shows how that cause of action may be enforced, namely, by affirmative action or counterclaim.

2 Affirmative Action or Counterclaim. *Effect of Acceptance.* The effect of acceptance upon the buyer's right of action for breach of warranty has been previously discussed. See section 130, *ante*. The Sales Act abolishes the rule that acceptance of the goods bars an action on implied warranties. The act makes the warranty survive in all cases. In *Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67, the rule of the Sales Act upon this point was construed. For cases illustrating the old rule that acceptance barred an action or counterclaim on the

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warranty, see the cases cited under section 130, ante, and Gurney v. Atlantic R. Co., 58 N. Y. 358; Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. 856, 37 L.R.A. 799, 56 Am. St. Rep. 636; Hardt v. Western Electric Co., 84 App. Div. 249, 82 N. Y. S. 835; Cluster Gas-light Co. v. Baker, 90 N. Y. S. 1034.

Right of Action.

Under this sub-section the buyer may assert his rights by action as plaintiff or by counterclaim. That the common law allowed an affirmative action to recover damages for breach of warranty is obvious. Bach v. Levy, 101 N. Y. 511, 5 N. E. 345. Such a right was not waived by a failure to counterclaim for the breach in an action for the price. Smith v. Foote, 81 Hun 128, 30 N. Y. S. 679; Cook v. Moseley, 13 Wend. (N. Y.) 277. Where the buyer's own negligence contributes to damages caused by a breach of warranty, he cannot recover for the breach. Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N. Y. S. 59.

Breach of "express warranty is matter for counterclaim, not for affirmative defense after the goods have been accepted." Nash v. Weidenfeld, 41 App. Div. 511, 58 N. Y. S. 609, affirmed 166 N. Y. 612, 59 N. E. 1127; Ginsberg v. Lawrence, 121 N. Y. S. 337, 338.

Pleading.

"It is not necessary, in pleading, where a party relies upon a mere general warranty of the quality of goods sold, to state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality, is sufficient." Hoe v. Sanborn, 21 N. Y. 552, 555, 78 Am. Dec. 163; Rogers v. Beckrich, 46 App. Div. 429, 61 N. Y. S. 725. In an action on a note given for the purchase price of a cow warranted to be "all right," which in fact was diseased, it is error to allow the defendant to show upon the question of damages the condition of the cow at the time of the trial, since the condition of the cow at the time of the sale is the only fact of importance. Mitchell v. Rowley, 63 Misc. 643, 118 N. Y. S. 751.

³ Right of Rejection. When goods tendered by the seller do not conform to a warranty, they may be rejected by the buyer. O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 258; American Art Metal Novelty Co. v. Bosselman, 91 N. Y. S. 722; Washington Hydraulic Press Brick Co. v. Sinnott, 92 N. Y. S. 504; Kupfer v. Pellman, 67 Misc. 149, 121 N. Y. S. 1081. Thus sub-section 1(c) expresses the common law of this state.

The rejection must be unconditional. Howard v. Hayes, 47 Super. Ct. (N. Y.) 89, affirmed 90 N. Y. 643; Tichnor v. Barley, 72 Misc. 638, 132 N. Y. S. 243.

The buyer is entitled to a reasonable time after delivery to examine

the goods and determine whether he desires to reject them. *Jacobs v. Day*, 5 Misc. 410, 25 N. Y. S. 763; *Abel v. Murphy*, 43 Misc. 648, 88 N. Y. S. 256; *Hart v. Wright*, 17 Wend. (N. Y.) 267, 277, affirmed 18 Wend. (N. Y.) 449.

4 Right of Rescission. The right given to the buyer in sub-section 1(d) is new to the law of New York. "Where, however, there is a warranty on a sale of goods without fraud, and no stipulation in the contract that the goods may be returned, the vendee has no right to annul the contract without the consent of the vendor. The only remedy is by an action on the warranty." *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 291, 38 Am. Dec. 588. See also *Muller v. Eno*, 14 N. Y. 597, 601; *Rust v. Eckler*, 41 N. Y. 488; *Day v. Pool*, 52 N. Y. 416, 418, 419, 11 Am. Rep. 719; *Bates v. Fish Bros. Wagon Co.*, 50 App. Div. 38, 63 N. Y. S. 649, affirmed 169 N. Y. 587, 62 N. E. 1094; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 626, 40 Am. Dec. 299; *Gelb v. Waller*, 115 N. Y. S. 201; *Giordano v. Nizzari*, 115 N. Y. S. 719. After accepting the goods and taking title, the buyer could not, at common law, for breach of warranty, return the goods to the buyer and rescind the contract, but must rely on his right of action for damages, if that were not extinguished by acceptance. This sub-section, therefore, makes a change in the law of Sales in this state which is one of the most noteworthy made by the Sales Act.

Sales Act Rule in Force Elsewhere.

The rule adopted by the Sales Act in sub-section 1 (d) has been in force in a number of American jurisdictions. See *George Lawley Corp. v. Park*, 138 Fed. 31, 70 C. C. A. 399; *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440; *Timken Carriage Co. v. Smith*, 123 Ia. 554, 99 N. W. 183; *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Bryant v. Isburgh*, 13 Gray (Mass.) 607, 74 Am. Dec. 655; *Branson v. Turner*, 77 Mo. 489; *Warder v. Fisher*, 48 Wis. 338, 4 N. W. 470.

Of this sub-section the Commissioners on Uniform State Laws make the following statement: "This draft allows rescission as a remedy for breach of warranty. The English law does not. In defense of the remedy of rescission, see an article by the draftsman in 16 Harv. L. Rev. 465. This article led to a discussion with Professor Burdick, who supported the English doctrine. See 4 Columbia L. Rev. 1, 195, 265; 17 Harv. L. Rep. 500;" * * * (30 Am. Bar. Assoc. Rep. 387).

5 Necessity of Election between Remedies. English Rule. This sub-section of the Sales Act seems to have been inserted partly to avoid the possibility of a decision like *Mondel v. Steel*, 8 M. & W. (Eng.) 858, in which it was held that a buyer might maintain an action against the seller for damages for breach of warranty, after he

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had recouped damages for breach of the same warranty in a previous action brought against him for the price.

American Rule.

The American courts, however, seem to have confined the buyer to one remedy among the four mentioned in sub-section 1. Thus in *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428, it was held that, when the buyer is sued for the price of the goods, he may not rely both on rescission of the contract relieving him from liability for the price and a counterclaim for damages for breach of a warranty which has survived acceptance. The two were held to be inconsistent. And so in *Lewis v. Doyle*, 13 App. Div. 291, 43 N. Y. S. 201, it was held that, where there had been rescission of the contract of sale by consent, the buyer's remedy is merely to recover the purchase price paid and not damages for breach of warranty.

Where a buyer has sought to recoup damages in an action against him for the price, but has failed, he cannot later sue for breach of warranty. He must elect his remedy and is confined to one. *Berman v. Henry N. Clark Co.*, 194 Mass. 248, 80 N. E. 480.

In *Gerli v. Mistletoe Silk Mills*, 80 N. J. L. 128, 76 Atl. 335, this situation was considered, the case being decided under the Sales Act, and the court said: "The remedy under subdivision (a) is recoupment in the strict sense of that word; and involves merely an abatement of the purchase price, which can amount to the whole purchase price only where the goods are worthless. The remedy under sub-division (b) is that which formerly was the subject of a cross action, but is now available by way of counterclaim under section 105 of the Practice Act. Pamph. L. 1903, p. 568. This remedy is inconsistent with the claim of a rescission of the contract and at the trial it will be necessary for the defendant to elect whether to stand upon the theory of a rescission, and abandon its claim to damages or to abandon the claim of rescission and rely upon the contract as subsisting and insist on damages for the breach."

Express Reservation of One Remedy.

But an express stipulation in a contract of sale reserving one remedy to a buyer upon a breach of warranty does not bar him from exercising others which the law gives him. *Eyers v. Haddem*, 70 Fed. 648; *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88; *White Furnace Co. v. C. W. Miller Transfer Co.*, 131 App. Div. 559, 115 N. Y. S. 625.

⁶ **Conditions Attached to Right to Rescind.** Since this right to rescind did not exist in New York prior to the passage of the Sales Act, there are no decisions directly bearing upon the subject matter of sub-section 3.

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Duty to Place in Statu Quo.

However, a buyer who rescinds a contract of sale on the ground of fraud must return or offer to return all he has received under the contract. *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588. In accordance with the last sentence of sub-section 2, it has been held in other states that where the goods cannot be returned in as good condition as when received, due to the breach of the warranty, the buyer may nevertheless rescind and return the damaged goods. *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L.R.A. (N.S.) 678 (horse sick due to breach of warranty that he had no disease at time of sale); *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485 (wagon broken down due to breach of warranty that it would carry certain weight).

Duty to Give Notice.

The duty of the buyer to notify the seller of an election to rescind is in accord with the provisions of section 130, ante, regarding the necessity of notice where the buyer intends to rely on the warranty after acceptance. See also section 146 concerning the necessity of notice when the seller rescinds. Upon the subject of notice when goods are rejected for breach of warranty, see *Richardson v. Levi*, 69 Hun 432, 22 N. Y. S. 352.

⁷ **Effect of Rescission.** This sub-section is in accord with obvious principles of justice that, when a contract is ended, a party having advanced money on the strength of the contract should recover it, and if he has advanced no money, he should not be liable on an obligation to pay money under a contract which has ceased. See *Berg v. Rapid Motor Vehicle Co.*, 78 N. J. L. 724, 75 Atl. 933 (decided under the New Jersey Sales Act); *Stone v. Frost*, 61 N. Y. 614; *Larrowe Milling Co. v. Lyons Beet Sugar Refining Co.*, 137 App. Div. 732, 122 N. Y. S. 567.

⁸ **Damages for Breach of Warranty. Ordinary Rule.** "The measure of damages generally applicable in an action for breach of warranty is the difference between the actual value of the object sold, with its defects, and the value which it would have had at the time of sale, if it had conformed to the warranty." *Miller v. F. R. Patch Mfg. Co.*, 101 App. Div. 22, 24, 91 N. Y. S. 870. For other cases supporting the doctrines of sub-sections 6 and 7, see *Parks v. Morris Ax Co.*, 54 N. Y. 586; *Hooper v. Story*, 155 N. Y. 171, 49 N. E. 773; *Mathes v. McCarthy*, 195 N. Y. 40, 87 N. E. 768; *Carleton v. Lombard*, 19 App. Div. 297, 46 N. Y. S. 120, affirmed 162 N. Y. 628, 57 N. E. 1106; *Bedford v. Hol-Tan Co.*, 143 App. Div. 372, 128 N. Y. S. 578; *Gordon Battery Co. v. American Watchman's Time Detector Co.*, 36 Misc. 802, 74 N. Y. S. 1128.

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In an action to recover for breach of warranty of title of a horse, the buyer may recover the price paid for the horse, and interest thereon, together with the costs he became liable to pay the true owners in their suit to establish title. But the attorney's fees which he was obliged to pay will not be allowed. *Armstrong v. Percy*, 5 Wend. (N. Y.) 535.

Right of Resale.

The buyer may resell the goods at auction for the purpose of measuring the damages which he has suffered by reason of the breach of warranty. *Messmore v. New York Shot Co.*, 40 N. Y. 422; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345.

Consequential Damages.

Consequential damages may frequently be recovered. See *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025 (value of goods destroyed by using warranted coloring matter which was damaging allowed to the buyer of the coloring matter); *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053 (oil for use in making carpets sold under express warranty; buyer allowed difference between value of carpets as made with defective oil and as they would have been if oil had been proper); *Ralph B. Carter Co. v. Fischer*, 121 N. Y. S. 614 (damage done to flowers due to defective condition of engine ordered to pump water into greenhouse); *Laufer v. Boynton Furnace Co.*, 84 Hun 311, 32 N. Y. S. 362 (defective heating apparatus in greenhouse); *Smith v. Foote*, 81 Hun 128, 131, 30 N. Y. S. 679 (sale of stained glass with warranty; buyer may recover actual damage sustained "in the use of the glass in question up to the time when he did in fact ascertain, or ought, in the exercise of reasonable care, to have ascertained, that the glass was unfit for the use to which it was put").

Crops.

Where seeds are sold and a warranty concerning them breached, the damages recoverable are the difference in value between the crop actually raised and the crop which would ordinarily have been raised, less the cost of raising the crop. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388; *Depew v. Peck Hardware Co.*, 121 App. Div. 28, 105 N. Y. S. 390.

Expenses of Prosecution.

If a wholesaler sells to a retailer goods which are illegally labelled, and the retailer suffers prosecution and fine thereby, the retailer may recover from the wholesaler as damages the amount of the fine and his costs and counsel fees, where he gives the wholesaler an opportunity to defend the action. *Friedgood v. Kline*, 67 Misc. 428, 123 N. Y. S. 247.

Physical Injuries.

A buyer cannot recover as damages for breach of a warranty that a machine shall do good work, be well made, of good materials and be durable, loss caused by physical injuries resulting from a defect in the machine. *Birdsinger v. McCormick Harvesting Mach. Co.*, 183 N. Y. 487, 5 Ann. Cas. 586, 76 N. E. 611, 3 L.R.A.(N.S.) 1047. The court said (p. 492): "It may be difficult to define the line of remoteness of damage; but it approaches to definiteness to say that, where the warranty is general, such damages, only are recoverable as the parties, standing chargeable with the knowledge of their legal rights and duties, may be deemed to have had in contemplation, when making their contract, as the result of the warranty being untrue. That which is an effect of the breach in a certain sense, but is removed one stage from it, is not the primary, but the secondary consequence of it." But in *Wood v. Anthony*, 79 App. Div. 111, 79 N. Y. S. 829, the court allowed recovery of damages for injuries received in an explosion of flash-light powder, when the seller had warranted that the magnesium used in the powder was free from explosive compounds. See also *Bruce v. Fiss, etc., Horse Co.*, 47 App. Div. 273, 62 N. Y. S. 96, where a breach of warranty of a horse caused personal injuries to a driver and recovery was allowed.

The question of the measure of damages in an action based upon breach of warranty of title has been discussed under section 94, ante.

§ 151.

Interest and Special Damages.

§ 151. INTEREST AND SPECIAL DAMAGES. Nothing in this article shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

Effect of Section. The topics of interest and special damages are obviously outside the scope of the Sales Act, and are left to be governed by the general rules of the common law upon those subjects.

English Act. Section 54 of the Sale of Goods Act is the exact duplicate of this section.

PART VI.

MISCELLANEOUS PROVISIONS.

CHAPTER XVI.

INTERPRETATION OF THE ACT.

§ 152. VARIATION OF IMPLIED OBLIGATIONS. Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated, or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Effect of Section. This and the following sections of the act require little annotation. They declare rules of interpretation concerning this particular act, rather than principles which have been the subject of discussion in judicial opinions. In *Atkinson v. Truesdell*, 127 N. Y. 230, 234, 27 N. E. 844, the court makes the following statement regarding usage: "Parol evidence may be given as to the uniform, continuous and well settled usage and custom pertaining to the matters embraced in the contract, unless such usage and custom contravene a rule of law, or alter or contradict the expressed or implied terms of a con-

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Variation of Implied Obligations.

tract, free from ambiguity." See also *Bradley v. Wheeler*, 44 N. Y. 495; *Hinton v. Locke*, 5 Hill (N. Y.) 437.

English Act. Section 55 of the Sale of Goods Act was the model for this section, and is its substantial equivalent.

§ 153.

Rights May Be Enforced by Action.

§ 153. RIGHTS MAY BE ENFORCED BY ACTION. Where any right, duty or liability is declared by this article, it may, unless otherwise by this article provided, be enforced by action.

English Act. This section follows **exactly section 57** of the Sale of Goods Act.

§ 154. RULE FOR CASES NOT PROVIDED FOR BY THIS ARTICLE. In any case not provided for in this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Effect of Section. Of this section the draftsman of the act states: "This section makes it clear that the Sales Act does not attempt to deal with certain matters which are, however, of great importance in the law of sale. As to these matters the common law governs." (Williston on Sales, p. 1032).

The following section was recommended for adoption by the Commissioners on Uniform State Laws, and in the draft follows the section next above, but was rejected by the New York legislature when it adopted the Sales Act; "Sec. 74. *Interpretation Shall Give Effect to Purpose of Uniformity.*—This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those states which enact it." Concerning this section the draftsman of the act makes the following statement: "The primary purpose of the Sales Act is to introduce uniformity, and though in the main it purports to state law previously existing, it is not the law of any one State, but, where the law in the several States differs, what may be regarded as the better doctrine. Accordingly no inference is permissible that the law of any particular State is intended to be codified. The law of all the

§ 154.

Rule for Cases Not Provided For.

States must be considered, and the purpose to unify that law must be borne in mind." (Williston on Sales, pp. 1032-1033).

English Act. Section 61 (2) of the Sale of Goods Act is followed in the drafting of this section.

§ 155. Provisions not Applicable to Mortgages.

§ 155. PROVISIONS NOT APPLICABLE TO MORTGAGES. The provisions of this article relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge or other security.

English Act. Section 61 (4) of the Sale of Goods Act is followed closely in the American section.

§ 156. DEFINITIONS. 1. In this article, unless the context or subject-matter otherwise requires:

“Action” includes counterclaim, set-off and suit in equity.

“Buyer” means a person who buys or agrees to buy goods or any legal successor in interest of such person.

“Defendant” includes a plaintiff against whom a right of set-off or counterclaim is asserted.

“Delivery” means voluntary transfer of possession from one person to another.

“Divisible contract to sell or sale” means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

“Document of title to goods” includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

“Fault” means wrongful act or default.

“Fungible goods” means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

“Goods” include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to

or forming part of the land which are agreed to be severed before sale or under the contract of sale.

“Order” in sections of this act relating to documents of title means an order by indorsement on the document.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

“Plaintiff” includes defendant asserting a right of set-off or counterclaim.

“Property” means the general property in goods, and not merely a special property.

“Purchaser” includes mortgagee and pledgee.

“Purchases” includes taking as a mortgagee or as a pledgee.

“Quality of goods” includes their state or condition.

“Sale” includes a bargain and sale as well as a sale and delivery.

“Seller” means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

“Specific goods” means goods identified and agreed upon at the time a contract to sell or a sale is made.

2. A thing is done “in good faith” within the meaning of this article when it is in fact done honestly, whether it be done negligently or not.

3. A person is insolvent within the meaning of this article who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

4. Goods are in a “deliverable state” within the meaning of this article when they are in such a state that the

buyer would, under the contract, be bound to take delivery of them.

Effect of Section. For a discussion of the effect upon the construction of the Statute of Frauds of the definition here given of the term "goods," see note to section 85, ante.

The following definition proposed by the Commissioners on Uniform State Laws for adoption in the Uniform Sales Act has been omitted from the New York act: " 'Value' is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor." The adoption of this definition of value would have made a change in the New York law upon that subject. *Stevens v. Brennan*, 79 N. Y. 254; *Button v. Rathbone*, 126 N. Y. 187, 27 N. E. 266; *La Manna v. Munroe*, 48 App. Div. 495, 62 N. Y. S. 984; *Kennedy v. National Union Bank*, 23 Hun (N. Y.) 494; *Northrup v. American Exch. Bank*, 44 Hun 626, mem., 7 N. Y. St. Rep. 582; *Asher v. Deyoe*, 77 Hun 531, 28 N. Y. S. 890; *Coddington v. Bay*, 20 Johns. (N. Y.) 637, 11 Am. Dec. 302; *Cowles v. Kiehel*, 65 N. Y. S. 349. Of this proposed definition the Commissioners on Uniform State Laws make the following statement: "The only one of these definitions requiring comment is that of value, which follows the weight of authority at common law and the provision of the Negotiable Instruments Law as intended by its framers. In regard to property other than negotiable instruments the law of many states does not regard an antecedent debt as value; but it seems desirable to have a single rule for what constitutes valuable consideration, and

mercantile convenience supports the one adopted. It is supported, moreover, by the law of England and a few of our states. See Williston's Cases on Sales (2d ed.) 369, n." (30 Am. Bar. Assoc. Rep. 391.)

English Section. Section 62 of the Sale of Goods Act has been followed by the American act in many instances, but some of the definitions here given are peculiar to the American act. See appendix for text of English act.

§ 157. No Application to Existing Contracts.

§ 157. ARTICLE DOES NOT APPLY TO EXISTING SALES OR CONTRACTS TO SELL. None of the provisions of this article shall apply to any sale, or to any contract to sell, made prior to the taking effect of this article.

Effect of Section. This section is peculiar to the New York Act, not having been recommended by the Commissioners on Uniform State Laws in the draft of the Sales Act.

§ 158. NO REPEAL OF UNIFORM WAREHOUSE RECEIPT LAWS. Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the law to make uniform the law of warehouse receipts, or of the law, if enacted, to make uniform the law of bills of lading, or of section nine hundred and forty-three of chapter eighty-eight of the laws of nineteen hundred and nine, constituting chapter forty of the consolidated laws.

Effect of Section. The Uniform Warehouse Receipts Law was adopted in this state by Laws of 1907, ch. 732, and is now found in sections 90 to 143, inclusive, of the General Business Law. The Uniform Bills of Lading Act was adopted in this state by Laws of 1911, ch. 248, and constitutes sections 187 to 241, inclusive, of the Personal Property Law. See appendix for text of this latter act. Chapter 40 of the Consolidated Laws constitutes the Penal Law.

Below are quoted sections 2 and 3 of Chapter 571 of the Laws of 1911, the statute which incorporated the Sales Act into the Personal Property Law.

“§ 2. Laws repealed. Section thirty-six of chapter forty-five of the laws of nineteen hundred and nine, constituting chapter forty-one of the consolidated laws, and so much of subdivision six of section thirty-one of chapter forty-five of the laws of nineteen hundred and nine, constituting chapter forty-one of the consolidated laws, as constitutes the first paragraph of said subdivision and section twenty of chapter twenty-five of the laws of nineteen hundred and nine, constituting chapter twenty of the consolidated laws, are hereby repealed.”

§ 158.

Saving Provisions.

"§ 3. This act shall take effect September first, nineteen hundred and eleven."

Section 36 of chapter 45 of the Laws of 1909 was entitled "Sales and charges other than chattel mortgages without delivery and change of possession." Its place is taken by sections 106 and 107 of the present Personal Property Law. See note to section 106, ante, for text of the repealed section.

The first paragraph of subdivision 6 of section 31 of chapter 45 of the Laws of 1909 was that portion of section 31 of the Personal Property Law relating to the Statute of Frauds governing sales of personal property. For its text and a note upon the effect of its repeal, see section 85, ante.

Section 20 of chapter 25 of the Laws of 1909 was that portion of the General Business Law entitled "Conduct of auction sales." For the text of the repealed section and a note thereon, see note to section 102, ante.

APPENDIX.

THE NEW YORK PERSONAL PROPERTY LAW.

- Article 1. Short title (§ 1).
2. Future estates; charitable uses; accumulation of income; trust estates (§§ 10-22).
 3. Agreements in writing; without consideration; fraudulent; factors (§§ 30-45).
 4. Contracts for the conditional sale of goods and chattels (§§ 60-67).
 5. Sales of goods (§§ 82-158).
 6. Laws repealed; when to take effect (§§ 165-166).
 7. Bills of lading (§§ 187-241).

ARTICLE 1.

Short Title.

§ 1. Short Title. This chapter shall be known as the "Personal Property Law."

ARTICLE 2.

Future Estates; Charitable Uses; Accumulation of Income; Trust Estates.

Section 10. Definitions.

11. Suspension of ownership.
12. Gifts and bequests of personal property for charitable purposes.

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Section 13. Certain educational and other charitable uses authorized.

- 13a. Trusts for care of cemetery lots, et cetera.
- 14. Certain gifts for charitable and educational uses regulated.
- 15. When income of trust fund is not alienable.
- 16. Validity of directions for accumulation of income.
- 17. Anticipation of directed accumulation.
- 18. Power to bequeath executed by general provision in will.
- 19. Disaffirmance of fraudulent acts by executors and others.
- 20. When trust vests in supreme court.
- 21. Investment of trust funds.
- 22. Commissions of trustees.
- 23. Revocation of trusts upon consent of all persons interested.

[Sections 10 to 23 are omitted because of their irrelevancy to the subject of Sales, but their titles are noted above for the sake of completeness.]

ARTICLE 3.**Agreements in Writing; Without Consideration; Fraudulent; Factors.**

§ 30. **Definitions.** As used in this article, the term "transfer" includes sale, assignment, conveyance, deed and gift, and the term "agreement" includes promise and undertaking.

§ 31. **Agreements required to be in writing.** Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and sub-

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scribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof;

2. Is a special promise to answer for the debt, default or miscarriage of another person;

3. Is made in consideration of marriage, except mutual promises to marry;

4. Is a conveyance or assignment of a trust in personal property;

5. Is a subsequent or new promise to pay a debt discharged in bankruptcy.

If goods be sold at public auction, and the auctioneer at the time of the sale, enters in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale was made, such memorandum is equivalent in effect to a note of the contract or sale, subscribed by the party to be charged therewith.

§ 32. Transfers and mortgages of interest in decedents' estates to be in writing, and recorded. Every conveyance, assignment, or other transfer of, and every mortgage or other charge upon the interest, or any part thereof, of any person in the estate of a decedent which is situated within this state, shall be in writing, and shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded. Any such instrument may also be recorded as hereinafter provided; and if not so recorded, it is void against any subsequent purchaser or mortgagee of the same interest or any part thereof, in good faith and for a valuable consideration, whose conveyance or mortgage is first duly recorded. If

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such interest is entirely in the personal property of a decedent, the conveyance or mortgage shall be recorded in the office of the surrogate issuing letters testamentary or letters of administration upon the said decedent's estate, or if no such letters have been issued, then in the office of the surrogate having jurisdiction to issue the same. If such interest is in both the personal and the real property of a decedent, the conveyance or mortgage shall be recorded in the office of the said surrogate and also in the office of the county clerk. Such a conveyance or mortgage when so recorded, shall be indexed under the name of the decedent in a book to be kept for that purpose by each recording officer. The person presenting any such instrument for record shall pay to the clerk of the surrogate's court a fee of ten cents for each folio.

§ 33. Validity of certain agreements made without consideration. An agreement for the purchase, sale, transfer or delivery of a certificate or other evidence of debt, issued by the United States or by any state, or a municipal or other corporation, or of any share or interest in the stock of any bank corporation or joint stock association, incorporated or organized under the laws of the United States or of any state, is not void or voidable, for want of consideration, or because of the non-payment of consideration, or because the vendor, at the time of making such contract, is not the owner or possessor of the certificate or certificates or other evidence of debt, share or interest.

§ 34. Transfers in trust for the transferrer. A transfer of personal property, made in trust for the use of the person making it, is void as against the existing or subsequent creditors of such person.

§ 35. Transfers and charges with fraudulent intent. Every transfer of any interest in personal property, or the

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income thereof, and every charge on such property or income, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with such intent, is void as against every person so hindered, delayed or defrauded.

§ 36. [Repealed, Laws of 1911, ch. 571, § 2.]

§ 37. **Fraudulent intent a question of fact.** The question of the existence of fraudulent intent in cases arising under this article, is a question of fact and not of law.

§ 38. **Transfers or charges without consideration.** A transfer or charge shall not be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

§ 39. **Successors to rights of creditors and purchasers.** A transfer, charge, sale or assignment, or proceeding declared by this article, to be void, as against creditors or purchasers, is equally void as against the heirs, successors, personal representatives or assignees of such creditors or purchasers.

§ 40. **Bona fide purchasers.** This article does not affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appear that such purchaser or incumbrancer had previous notice of the fraudulent intent of his immediate vendor, or of the fraud rendering void the title of such vendor.

§ 41. **Transfer of claims.** 1. Any claim or demand can be transferred, except in one of the following cases:

(1) Where it is to recover damages for a personal injury, or for a breach of promise to marry.

(2) Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest

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in real property, a grant of which, by the transferrer, would be void by such a statute.

(3) Where a transfer thereof is expressly forbidden by a statute of the state, or of the United States, or would contravene public policy.

2. A judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred; but if it is vacated or reversed, the transfer thereof does not transfer the cause of action unless the latter was transferable before the judgment was recovered.

3. Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defense or counter-claim, in his own name, as the transferrer might have done; subject to any defense or counter-claim, existing against the transferrer, before notice of the transfer, or against the transferee. But this section does not apply, where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred.

§ 42. Regulating loans of money on salaries. 1. Any person or persons, firm, corporation or company, who shall after the passage of this act, make to any employee an advance of money, or loan, on account of salary or wages due or to be earned in the future by such individual, upon an assignment or note covering such loans or advances, shall not acquire any right to collect or attach the same while in the possession or control of the employer, unless such note or assignment is dated on the same day on which such loan is actually made, and unless within a

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period of three days after such loan and assignment or note are actually made the party making such loan or loans and taking such assignment or notes shall have filed with the employer or employers of the individual or individuals so assigning his present or prospective salary or wages, a duly authenticated copy of such agreement or assignment or notes under which the claim is made. The day of making a loan or advance within the meaning of this act shall be deemed to be the day when the money is delivered to the borrower, and the subsequent execution of an instrument by virtue of a power of attorney shall not be deemed to affect the time of the actual making of such loan or advance.

2. No action shall be maintained in any of the courts of this state, brought by the holder of any such contract, assignment or notes, given by an employee for moneys loaned on account of salary or wages, in which it is sought to charge in any manner the employer or employers, unless a copy of such agreement, assignment or notes, together with a notice of lien, was duly filed with the employer or employers of the person making such agreement, assignment or notes, by the person or persons, corporation or company making said loan within three days after the said loan was actually made and the said agreement, assignment or notes were given as provided in the previous section.

3. Every person, firm or corporation engaged in or seeking to engage in the business of loaning money upon security of an assignment of salary or wages either earned or to be earned shall, on or before the first day of July next ensuing the passage of this act, file with the clerk of the county in which said person, firm or corporation has its place of business or transacts business a statement under oath containing the name and residence of the individual;

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or in case of a firm, the names and residences of the partners; or in the case of a corporation, the names and residences of the officers and directors, managers or trustees of such corporation; and the place or places where said business is transacted by such an individual, firm or corporation. After July the first next ensuing the passage of this act it shall be unlawful to engage in the business of loaning money in the manner set forth in this act without, prior to engaging in such business, filing a statement as provided in this act.

4. The several county clerks of this state shall keep an alphabetical index of all persons, firms or corporations filing certificates provided for herein, and for the indexing and filing of such certificates, they shall receive a fee of twenty-five cents. A copy of such certificate, duly certified to by the county clerk in whose office the same was filed, shall be presumptive evidence in all courts of law in this state of the facts therein contained.

5. After the passage of this act, no person shall directly or indirectly receive or accept for the use and sale of his personal credit or for making any advance or loan of money, either wholly or partly in anticipation of salary or wages due or to be earned, a greater sum than at the rate of eighteen per centum per annum on the amount of such loan or advance, either as a bonus, interest or otherwise, or under the guise of a charge for investigating the status of a person applying for such loan or advance, drawing of papers or other service in connection with such loan or advance, except such charges as are now permitted by section three hundred and eighty of chapter twenty-five of the laws of nineteen hundred and nine, known as the "general business law."

6. Every person, firm, corporation, director, agent, of-

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ficer or member thereof who shall violate any provision of this act, directly or indirectly, or assent to such violation, shall be guilty of a misdemeanor.

§ 43. Factors' act. 1. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

2. Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

3. Nothing contained in the preceding subdivisions of this section shall be construed to prevent the true owner of any merchandise so deposited, from demanding or receiving the same, upon prepayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such mer-

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chandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

4. Nothing contained in this section shall authorize a common carrier, warehouseman, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

§ 44. Transfer of goods in bulk. 1. The transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferrer's business, or the transfer of an entire such stock in bulk, shall be presumed to be fraudulent and void as against the creditors of the transferrer, unless the proposed transferee shall, at least five days before the transfer, in good faith, make full and explicit inquiry of the transferrer as to the names and addresses of each and all of the creditors of the transferrer, and unless such transferee shall at least five days before the transfer in good faith notify or cause to be notified of the proposed transfer personally or by registered mail each of the creditors of the transferrer of whom such transferee has knowledge, or can with the exercise of reasonable diligence acquire knowledge.

2. The transferrer shall at least five days before such transfer fully and truthfully answer in writing such transferee's inquiries as to the names and addresses of the transferrer's creditors, and if such transferrer shall knowingly or wilfully refuse so to answer or make or deliver or cause to be made or delivered to such transferee any false or incomplete answer to such inquiries, said transferrer shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished accordingly.

3. Transfers under this section shall include sales, ex-

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changes and assignments, but nothing contained in this section shall apply to transfers by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustee in bankruptcy, or by any public officer under judicial process.

§ 45. Notice of liens upon merchandise or the proceeds thereof to secure loans or advances. Liens upon merchandise or the proceeds thereof created by agreement for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, shall not be void or presumed to be fraudulent or void as against creditors or otherwise, by reason of want of delivery to or possession on the part of the lienor, whether such merchandise shall be in existence at the time of the creation of the lien or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the person creating the lien, provided there shall be placed and maintained in a conspicuous place at the entrance of every building or place in or at which such merchandise, or any part thereof, shall be located, kept or stored, a sign on which is printed in legible English, the name of the lienor and a designation of said lienor as lienor, factor or consignee, and provided further that a notice of the lien is filed, stating:

1. The name of the lienor, and the name under which the lienor does business, if an assumed name; the principal place of business of the lienor within the state; and if the lienor is a partnership or association the names of the partners, and if a corporation the state under whose laws it was organized.

2. The name of the person creating the lien, and the in-

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terest of such person in the merchandise, as far as known to the lienor.

3. The general character of merchandise subject to the lien, or which may become subject thereto, and the period of time during which such loans or advances may be made under the terms of the agreement creating the lien.

Such notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge. It must be filed with the officer designated in section two hundred and thirty-two of the lien law, in every town or city where the merchandise subject to the lien, or any part thereof, is or at any time shall be located, kept or stored, and also in the town or city where the principal office or place of business of the lienor within the state is or at any time shall be located. Such officers shall file every such notice presented to them for that purpose and shall endorse thereon its number and the time of its receipt. They shall enter in a book provided for that purpose, in separate columns, the names of the parties named in each notice so filed under the head of "owners" and "lienors," the number of such notice and the date of the filing thereof, and the general character of the merchandise as therein stated. The names of the persons creating the liens, as stated in the notice, shall be arranged in alphabetical order under the head of "owners." Such officers at the time of filing such notice shall upon request issue to the person filing the same a receipt in writing, containing the substance of the entries made or to be made as hereinabove provided. Such officers shall be entitled to receive for their services hereunder, fees at the same rates as provided in section two hundred and thirty-four of the lien law.

Such notice may be filed at any time after the making

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of the agreement, and shall be effectual from the time of the filing thereof as against all rights of third parties thereafter arising. Upon the payment or satisfaction of indebtedness secured by any lien specified in this section, the lienor or his legal representative, upon the request of any person interested in the said merchandise, must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer or officers with whom the notice of lien is filed must, on receipt of such certificate or a copy thereof certified as required by law, file the same in his office and write the word "discharged" in the book where the notice of lien is entered opposite the entry thereof, and the lien is thereby discharged.

If the agreement creating such lien shall also give the lienor a right to or lien upon accounts receivable resulting from or which may result from a sale or sales of the merchandise subject to the lien, or of part of such merchandise, such right or lien shall not be void or ineffectual as against creditors or otherwise, by reason of want of possession of any such account on the part of the lienor or by reason of failure to make or deliver a further assignment of any such account, provided a bill, invoice, statement or notice shall be mailed, sent or delivered to the person owing such account receivable, stating or indicating that the account is payable to the lienor, and such mailing, sending or delivery of such bill, invoice, statement or notice shall have the same effect as a formal assignment of such account to the lienor named therein.

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ARTICLE 4.**Contracts for the Conditional Sale of Goods and Chattels.**

§ 60. Definitions. The term "conditional vendor," when used in this article, means the person contracting to sell goods and chattels upon condition that the ownership thereof is to remain in such person, until such goods and chattels are fully paid for or until the occurrence of any future event or contingency; the term "conditional vendee," when so used, means the person to whom such goods and chattels are so sold.

§ 61. Conditional sale of railroad equipment and rolling stock. Whenever any railroad equipment and rolling stock is sold, leased or loaned under a contract which provides that the title to such property, notwithstanding the use and possession thereof by the vendee, lessee or bailee, shall remain in the vendor, lessor or bailor, until the terms of the contract as to the payment of instalments, amounts or rentals payable, or the performance of other obligations thereunder, are fully complied with, and that title to such property shall pass to the vendee, lessee or other bailee on full payment therefor, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee or bailee for a valuable consideration, without notice, unless

1. Such contract is in writing, duly acknowledged and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of such vendee, lessee or bailee; and unless

2. Each locomotive or car so sold, leased or loaned, has

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the name of the vendor, lessor or bailor, or of the assignee of such vendor, lessor or bailor, plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

§ 62. Conditions and reservations in contracts for the sale of goods and chattels. Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by delivery of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees, in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article, and unless the other provisions of the lien law applicable to such contracts are duly complied with. Every such contract for the conditional sale of any goods and chattels attached, or to be attached, to a building, shall be void as against subsequent bona fide purchasers or incumbrancers of the premises on which said building stands, and as to them the sale shall be deemed absolute, unless, on or before the date of the delivery of such goods or chattels at such building, such contract shall have been duly and properly filed and indexed as directed in this article and unless said contract shall contain a brief description, sufficient for identification, of the premises which said building occupies, or upon which said building stands, and if in a city or village its location by street number, if known, and if in a city or county where

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the block system of recording and indexing conveyances is in use, the section and block within which it is located.

§ 63. Where contract to be filed. Such contracts except contracts for the conditional sale of goods and chattels supplied for a building and attached or to be attached thereto, shall be filed in the city or town where the conditional vendee resides, if he resides within the state at the time of the execution thereof, and if not, in the city or town where such property is at such time. Such contract shall be filed in the city of New York, as follows, namely: in the borough of Brooklyn in said city, such instrument shall be filed in the office of the register of the county of Kings; in the borough of Queens in said city, in the office of the clerk of Queens county; in the borough of Richmond in said city, in the office of the clerk of the county of Richmond, and in the borough of Manhattan and the borough of the Bronx in said city, in the office of the register of the county of New York; in every other city or town of the state, in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it shall be filed in such office. But all such contracts for the conditional sale of goods and chattels, attached or to be attached to a building, shall be filed with the register of the city or county or with the county clerk of the county, in case there is no register of such county, in which the premises whereon the said building stands are located.

§ 64. Indorsement, entry, refiling and discharge of conditional contracts. The provisions of article ten of the lien law relating to chattel mortgages apply to the indorsement, entry, refiling and discharge of contracts for the conditional sale of goods and chattels, except contracts for the conditional sale of goods and chattels, attached or to be attached to a building. The officers with whom such

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first mentioned contracts are filed shall enter the future contingency or event required to occur before the ownership of said goods and chattels shall pass from the vendor to the vendee, the amount due upon such contract and the time when due. The name of the conditional vendor shall be entered in the column of "mortgagees," and the name of the conditional vendee in the column of "mortgagors." Where such contracts are for goods and chattels, attached or to be attached to a building, the following provisions apply to the indorsement, entry, refiling and discharge thereof. The above named officers, with whom such contracts are directed to be filed, shall enter the future contingency or event required to occur before the ownership of said goods and chattels shall pass from the vendor to the vendee, the amount due upon such contract, and the time when due, and shall file every such contract presented to them for that purpose, and indorse thereon its number and time of receipt; they shall enter in a book provided for that purpose, in separate columns, the names of all the parties to each contract so filed, arranged in alphabetical order, under the head of "vendees" and "vendors," the number of such contract and the date of the filing thereof, and under a column headed "property," they shall enter a brief description sufficient for identification of the land upon which said building stands, and if in a city or village, its location by street and number, if known, and if in a city or county where the block system of recording and indexing conveyances is in use, the section and block in which the said land is situated. The said officers shall also keep an index, so as to afford correct and easy reference to the books containing the entries in regard to such last named contracts. In all cities and counties where the block system of recording and indexing conveyances is in use,

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the index shall be arranged according to the block numbers. A contract for the conditional sale of goods and chattels, attached or to be attached to a building, shall be invalid as against creditors of the conditional vendee and against subsequent purchasers or mortgagees in good faith of such goods and chattels or of the premises upon which the said building stands, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless: (1) within thirty days preceding the expiration of such term a statement containing a description of such contract, the names of the parties, the time when and place where filed, the interest of the conditional vendor or of any person who has succeeded to his interest in the property, claimed by virtue thereof; or (2) a copy of such contract and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the conditional vendor or of any person who has succeeded to his interest in the contract, is filed in the office where the contract was originally required to be filed; and the officer with whom such contract was originally filed shall enter, in a separate column, in the book above provided for, in a column headed "date of refiling," the date of the refiling of the said contract. The officers performing services under this article are entitled to receive the same fees as for like services relating to chattel mortgages. Upon the title to the goods and chattels affected by any such last mentioned contract becoming absolute in the conditional vendee or his successor in interest by the payment of the full consideration for which any such contract was made, the conditional vendor, his assignee or legal representative, upon the request of the conditional vendee or of any person interested in the property covered by such contract, must sign and acknowledge a certificate setting forth such payment. The officer with whom such

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contract is filed must, on receipt of such certificate, file the same in his office and write the word "discharged" in the book where the contract is entered, opposite the entry thereof, and the contract is thereby discharged.

§ 65. Sale of property retaken by vendor. Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest, may comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof.

§ 66. Notice of sale. Not less than fifteen days before such sale, a printed or written notice shall be served personally upon the vendee, or his successor in interest, if he is within the county where the sale is to be held; and if not within such county, or he can not be found therein, such notice must be mailed to him at his last known place of residence.

Such notice shall state:

1. The terms of the contract.
2. The amount unpaid thereon.
3. The amount of expenses of storage.

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4. The time and place of the sale, unless such amounts are sooner paid.

§ 67. **Disposition of proceeds.** Of the proceeds of such sale, the vendor or his successor in interest may retain the amount due upon his contract, and the expenses of storage and of sale; the balance thereof shall be held by the vendor or his successor in interest, subject to the demand of the vendee or his successor in interest, and a notice that such balance is so held shall be served personally or by mail upon the vendee or his successor in interest. If such balance is not called for within thirty days from the time of sale, it shall be deposited with the treasurer or chamberlain of the city or village, or the supervisor of the town where such sale was held, and there shall be filed therewith a copy of the notice served upon the vendee or his successor in interest and a verified statement of the amount unpaid upon the contract, expenses of storage and of sale and the amount of such balance. The officer with whom such balance was deposited shall credit the vendee or his successor in interest with the amount thereof and pay the same to him on demand after sufficient proof of identity. If such balance remains in possession of such officer for a period of five years, unclaimed by the person legally entitled thereto, it shall be transferred to the funds of the town, village or city, and be applied and used as other moneys belonging to such town, village or city.

ARTICLE 5.

Sale of Goods.

(These sections, namely, 82 to 158, inclusive, constitute the Sales Act and are to be found, with annotations, in the body of this book).

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ARTICLE 6.

Laws Repealed; When to Take Effect.

§ 165. **Laws Repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 166. **When to Take Effect.** This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Revised Statutes..Part 1, chapter 20, title 19, article 2..All
 Revised Statutes..Part 2, chapter 1, title 2, section ...63
 Revised Statutes..Part 2, chapter 4, title 4,All
 Revised Statutes..Part 2, chapter 7, title 2,All
 Revised Statutes..Part 2, chapter 7, title 3,All

Laws of	Chapter	Section
1787.....	44.....	Part relating to personal property
R. L. 1813.	19.....	1
1828.....	20.....	15, §§ 31, 45 (2d meet.)
1830.....	179.....	3-6
1840.....	318.....	Part relating to personal property
1841.....	261.....	Part relating to personal property
1846.....	74.....	Part relating to personal property
1855.....	432.....	Part relating to personal property
1858.....	134.....	All
1858.....	314.....	All
1863.....	464.....	All
1882.....	185.....	All
1882.....	324.....	All
1889.....	65.....	All
1889.....	487.....	All
1891.....	173.....	All
1892.....	516.....	Part relating to personal property

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Laws of	Chapter	Section
1893.....	452.....	All
1893.....	701.....	Part relating to personal property
1894.....	740.....	All
1896.....	249.....	Part relating to personal property
1897.....	417.....	All except part of § 9 relating to guardians and executors, administrators and other trustees of deceased persons
1897.....	418.....	110-118
1898.....	354.....	All
1900.....	248.....	4
1900.....	762.....	All
1901.....	291.....	Part relating to personal property
1902.....	150.....	All
1902.....	295.....	All except part relating to guardians and executors, administrators and other trustees of deceased persons
1902.....	528.....	All
1903.....	87.....	All
1904.....	77.....	All
1904.....	259.....	All
1904.....	569.....	All
1904.....	692.....	Part relating to personal property
1904.....	698.....	All
1905.....	393.....	Part relating to personal property
1905.....	503.....	All
1907.....	669.....	All
1907.....	722.....	All
1908.....	173.....	Part relating to personal property
Code Civil Procedure..		1909, 1910, 1912

ARTICLE 7.***Bills of Lading.**

§ 187. Bills governed by this article. Bills of lading issued by any common carrier shall be governed by this article.

§ 188. Form of bills. Essential terms. Every bill must embody within its written or printed terms—

- (a) The date of its issue,
- (b) The name of the person from whom the goods have been received,
- (c) The place where the goods have been received,
- (d) The place to which the goods are to be transported,
- (e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person,
- (f) A description of the goods or of the packages containing them, which may, however, be in such general terms as are referred to in section twenty-three, and
- (g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

§ 189. Form of bills. What terms may be inserted. A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

- (a) Be contrary to law or public policy, or

*Laws of 1911, ch. 248. In effect, September 1, 1911. Substantially the Uniform Bills of Lading Act.

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(b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

§ 190. Definition of non-negotiable or straight bill.

A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill.

§ 191. Definition of negotiable or order bill. A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is a negotiable or order bill.

Any provision in such a bill that it is non-negotiable shall not affect its negotiability within the meaning of this act.

§ 192. Negotiable bills must not be issued in sets. Negotiable bills issued in this state for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets.

If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of goods by the carrier to a holder of one of the other parts.

§ 193. Duplicate negotiable bills must be so marked. When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the

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damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill.

§ 194. Non-negotiable bills shall be so marked. A non-negotiable bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable" or "not negotiable."

This section shall not apply, however, to memoranda, or acknowledgments of an informal character.

§ 195. Insertion of name of person to be notified. The insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

§ 196. Acceptance of bill indicates assent to its terms. Except as otherwise provided in this article, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy.

§ 197. Obligation of carrier to deliver. A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by—

*(a) An offer in good faith to satisfy the carrier's lawful lien bill which was issued for the goods, if the bill is negotiable, and upon the goods,

*So in original.

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*(b) An offer in good faith to surrender, properly indorsed, the

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

§ 198. Justification of carrier in delivering. A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a non-negotiable bill for the goods, or

(c) A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee.

§ 199. Carrier's liability for misdelivery. Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

* So in original.

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(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

§ 200. Negotiable bills must be canceled when goods delivered. Except as provided in section two hundred and thirteen and except when compelled by legal process, if a carrier deliver goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto.

§ 201. Negotiable bills must be canceled or marked when parts of goods delivered. Except as provided in section two hundred and thirteen, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion

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of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

§ 202. Altered bills. Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

§ 203. Lost or destroyed bills. Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of goods under an order of the court as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

§ 204. Effect of duplicate bills. A bill upon the face of which the word "duplicate" or some other word or words

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indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

§ 205. Carrier cannot set up title in himself. No title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

§ 206. Interpleader of adverse claimants. If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate.

§ 207. Carrier has reasonable time to determine validity of claims. If some one other than the consignee or person in possession of the bill, has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

§ 208. Adverse title is no defense, except as above provided. Except as provided in the two preceding sections and in section twelve, no right or title of a third

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person unless enforced by legal process shall be a defense to an action brought by the consignee of a non-negotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand.

§ 209. Liability for nonreceipt or misdescription of goods. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to

- (a) The consignee named in a non-negotiable bill, or
- (b) The holder of a negotiable bill,

Who has given value in good faith relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if

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such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill.

§ 210. Attachment or levy upon goods for which a negotiable bill has been issued. If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

§ 211. Creditor's remedies to reach negotiable bills. A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

§ 212. Negotiable bill must state charges for which lien is claimed. If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the

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charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

§ 213. Effect of sale. After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

§ 214. Negotiation of negotiable bills by delivery. A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

§ 215. Negotiation of negotiable bills by indorsement. A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

§ 216. Transfer of bills. A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby.

A non-negotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional right.

§ 217. Who may negotiate a bill. A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods

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to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

§ 218. Rights of person to whom a bill has been negotiated. A person to whom a negotiable bill has been duly negotiated acquires thereby:

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

§ 219. Rights of person to whom a bill has been transferred. A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferrer, the title to the goods, subject to the terms of any agreement with the transferrer. If the bill is non-negotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferrer of the bill immediately before the notification.

Prior to the notification of the carrier by the transferrer or transferee of a non-negotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the carrier by the transferrer or a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer.

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A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods.

§ 220. Transfer of negotiable bill without indorsement. Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

§ 221. Warranties on sale of bill. A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants:

- (a) That the bill is genuine,
- (b) That he has a legal right to transfer it,
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill, and
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim.

§ 222. Indorser not a guarantor. The indorsement

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of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

§ 223. No warranty implied from accepting payment of a debt. A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described.

§ 224. When negotiation not impaired by fraud, accident, mistake, duress or conversion. The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress or conversion.

§ 225. Subsequent negotiation. Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

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§ 226. **Form of the bill as indicating rights of buyer and seller.** Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(c) Where by the bill goods are deliverable to the order of the buyer or of his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser

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has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

§ 227. Demand, presentation or sight draft must be paid, but draft on more than three days' time merely accepted before buyer is entitled to the accompanying bill. Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order.

§ 228. Negotiation defeats vendor's lien. Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent

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to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

§ 229. When rights and remedies under mortgages and liens are not limited. Except as provided in section two hundred and twenty-eight, nothing in this article shall limit the rights and remedies of a mortgagee or lienholder whose mortgage or lien on goods would be valid, apart from this article, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

§ 230. Issue of bill for goods not received. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier, or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

§ 231. Issue of bill containing false statement. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 232. Issue of duplicate bills not so marked. Any

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officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of *section seven, knowing that a former negotiable bill for the same goods or any part of them is outstanding, and uncanceled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

§ 233. Negotiation of bill for mortgaged goods. Any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterward negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 234. Negotiation of bill when goods are not in carrier's possession. Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

§ 235. Inducing carrier to issue bill when goods have not been received. Any person who with intent to defraud secures the issue by a carrier of a bill knowing

* So in original.

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that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or both.

§ 236. Issue of non-negotiable bill not so marked.

Any person who with intent to defraud issues or aids in issuing a non-negotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

§ 237. Rule for cases not provided for in this article.

In any case not provided for in this article, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, accident, mistake, bankruptcy or other invalidating cause, shall govern.

§ 238. Interpretation shall give effect to purpose of uniformity. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 239. Definitions. (1) In this article, unless the context or subject-matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading.

Personal Property Law.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation, or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee and to take as pledgee.

“Purchaser” includes mortgagee and pledgee.

(2) A thing is done “in good faith,” within the meaning of this article, when it is in fact done honestly, whether it be done negligently or not.

§ 240. Article does not apply to existing bills. The provisions of this article do not apply to bills made and delivered prior to the taking effect thereof.

§ 241. Inconsistent legislation repealed. All acts or parts of acts inconsistent with this article are hereby repealed.

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ENGLISH SALE OF GOODS ACT.*

56 AND 57 VICTORIA, C. 71.

AN ACT for codifying the Law relating to the Sale of Goods. [20 February, 1894.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1—(1.) A contract of sale of goods is a contract where-
by the seller transfers or agrees to transfer the property in
goods to the buyer for a money consideration, called the
price. There may be a contract of sale between one part
owner and another.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the
goods is transferred from the seller to the buyer the con-
tract is called a sale; but where the transfer of the property
in the goods is to take place at a future time or subject to
some condition thereafter to be fulfilled the contract is called
an agreement to sell.

(4.) An agreement to sell becomes a sale when the time

* Reprinted here because it was the model from which the American act was drawn, and because the cases construing it are briefly digested in the notes in the body of this book.

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elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessities are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time

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of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

Subject-matter of Contract.

5.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

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The Price.

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale “month” means *prima facie* calendar month.

11.—(1.) In England or Ireland—

(a.) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the con-

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dition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(*b.*) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract:

(*c.*) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1.) An implied condition on the part of the seller that

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in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be

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the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2.) In the case of a contract for sale by sample—

(a.) There is an implied condition that the bulk shall correspond with the sample in quality:

(b.) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c.) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16. Where there is a contract for the sale of unascer-

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tained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on ap-

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proval or "on sale or return" or other similar terms the property therein passes to the buyer:—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does

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not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title.

21.—(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods

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is by his conduct precluded from denying the seller's authority to sell.

(2.) Provided also that nothing in this Act shall affect—

(a.) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof:

(b.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

23.—When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of

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the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

25.—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term “mercantile agent” has the same meaning as in the Factors Acts.

26.—(1.) A writ of *fiery facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sher-

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iff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his resi-

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dence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the

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goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

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(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

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37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38.—(1.) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Act—

(a.) When the whole of the price has not been paid or tendered;

(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2.) In this part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of

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stopping the goods *in transitu* after he has parted with the possession of them;

(c.) A right of resale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or pouding; and such arrestment or pouding shall have the same operation and effect in a competition or otherwise as an arrestment or pouding by a third party.

Unpaid Seller's Lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

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43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon—

(a.) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowl-

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edges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.—(1.) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the

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seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of the seller. The expense of such redelivery must be borne by the seller.

Resale by Buyer or Seller.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable

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time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

(2.) The measure of damages is the estimated loss direct-

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ly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

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The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53.—(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a.) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b.) maintain an action against the seller for damages for the breach of warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

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PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not other-

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wise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of

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sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62.—(1.) In this Act, unless the context or subject matter otherwise requires—

“Action” includes counter-claim and set-off, and in Scotland condescendence and claim and compensation:

“Bailee” in Scotland includes custodier:

“Buyer” means a person who buys or agrees to buy goods:

“Contract of sale” includes an agreement to sell as well as a sale:

“Defendant” includes in Scotland defender, respondent, and claimant in a multiplepinding:

“Delivery” means voluntary transfer of possession from one person to another:

“Document of title to goods” has the same meaning as it has in the Factors Acts:

“Factors Acts” mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

“Fault” means wrongful act or default:

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale:

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of

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the land which are agreed to be severed before sale or under the contract of sale:

“Lien” in Scotland includes right of retention:

“Plaintiff” includes pursuer, complainer, claimant in a multiplepounding and defendant or defender counter claiming:

“Property” means the general property in goods, and not merely a special property:

“Quality of goods” includes their state or condition:

“Sale” includes a bargain and sale as well as a sale and delivery:

“Seller” means a person who sells or agrees to sell goods:

“Specific goods” mean goods identified and agreed upon at the time a contract of sale is made:

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2.) A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a “deliverable state” within the mean-

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ing of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This Act may be cited as the Sale of Goods Act, 1893.

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